MISSISSIPPI LAW JOURNAL

PROOF OF DAMAGES TO PROPERTY IN TORT ACTIONS
Ernest W. Graves

SOME ANIMADVERSIONS ON LAND LINE CASES
Robert G. Gillespie

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—II
William P. Murphy

APPLICATION OF THE DOCTRINE OF SHELLEY V. KRAEMER TO THE DETERMINABLE FEE
Joe O. Sams, Jr.

March 1962

VOLUME XXXIII NUMBER 2

THE J. E. NEILSON CO.

DEPARTMENT STORE

OXFORD, MISS.

The Best Place to Shop for More
Than 100 Years

The *Mississippi Law Journal* welcomes the receipt of duplicate back issues which you may have on hand. We will pay postage for any back issues of the *Mississsippi Law Journal* you may wish to send.

INDICES AND REPRINTS AVAILABLE

	Members, Mississippi State Bar	Non-members
Index, Vols. 1-20 (1928-1949)	$7.50 hard cover $1.50 soft cover	same
Index, Vols. 21-30 (1949-1959)	$1.50	$ 5.00
Reprint, Vol. I	$8.50	$10.00
Reprint, Vol. II	$8.50	$10.00

Back issues of the *Mississippi Law Journal* are also available.
All prices are postpaid. Address orders to:

MISSISSIPPI LAW JOURNAL

University, Mississippi

MORE FOR YOUR MONEY
with Insured Safety

are you responsible for these:

- PENSION FUNDS
- LEGAL TRUST FUNDS
- CORPORATE ACCOUNTS
- PERPETUAL CARE FUNDS
- INDIVIDUAL ACCOUNTS

Accounts easily opened and handled by mail

4½% *Current Dividend*

Many lawyers in charge of money for others find that First Federal of Jackson is one of the best places for trust funds. Accounts are insured up to $10,000 by the Federal Savings and Loan Insurance Corporation. In addition, they are guarded by the sound management which has made this institution grow into one of the largest Savings and Loan Associations in the South. All funds are available upon demand.

FIRST FEDERAL
SAVINGS AND LOAN ASSOCIATION

MAIN OFFICE: 204 SO. STATE ST.

WESTLAND BRANCH at ROBINSON ROAD | MEADOWBROOK BRANCH at NO. STATE STREET

JACKSON, MISSISSIPPI

Try LAW WEEK

for three months

at ½ the regular rate

LAW WEEK *safeguards you against missing a single point of legal importance . . . saves your time by greatly reducing your reading load!*

WHAT YOU GET—each week

- **Significant federal and state decisions**—all the precedent-setting cases establishing new principles of law. Typical headings: Antitrust, Taxation, Insurance, Public Contracts, Labor, Transportation, Trade Regulation, Criminal Law, Public Utilities, Railroads.

- **Immediate notice of important new federal agency rulings** — among them rulings in the fields of Money and Finance, Aeronautics, Taxation, Public Contracts, Shipping, Labor.

- **Supreme Court Opinions, in full text**—mailed to you the same day they are handed down — plus Supreme Court Orders, Journals, Docket, Arguments.

- **Summary and Analysis**—a five minute review of new law, including an incisive analysis of the leading cases of the week.

For further information on the Special LAW WEEK introductory offer, write:

THE BUREAU OF NATIONAL AFFAIRS, INC.

1231 — 24th Street, N.W., Washington 7, D.C.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII MARCH 1962 NUMBER 2

CONTENTS

LEADING ARTICLES

PROOF OF DAMAGES TO PROPERTY IN TORT ACTIONS ..... *Ernest W. Graves* 151

SOME ANIMADVERSIONS ON LAND LINE CASES ..... *Robert G. Gillespie* 159

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—II ..... *William P. Murphy* 164

APPLICATION OF THE DOCTRINE OF SHELLEY V. KRAEMER TO THE DETERMINABLE FEE ..... *Joe O. Sams, Jr.* 200

STATE BAR SECTION

THE UNITED STATES LAWYER—OUR GREATEST NATIONAL RESOURCE IN THE COLD WAR 211

STUDENT COMMENTS

FEDERAL ESTATE TAXATION OF FUTURE INTERESTS 217

THE CREATION OF A POWER OF APPOINTMENT MARITAL DEDUCTION TRUST 232

RECENT DECISIONS

Bankruptcy—Collection of Tax Penalties Secured by Prebankruptcy Liens 248

Constitutional Law—The "Home-Port" Doctrine Applied to International Air Commerce 249

Constitutional Law—The Practice of Religious Ritual in Public Schools 251

Implied Warranty—Liability of Hospital for Injury or Death Resulting from Blood Transfusion—Applicability to Mississippi Law 253

Oil and Gas—Scope of the Easement in Granting Surface Rights to the Lessee 257

Restitution—Necessity of Returning Consideration to Avoid Release 259

Torts—Dunning: An Invasion of the Right of Privacy 261

RECENT BOOKS

Expulsion or Oppression of Business Associates ..... *Forrest B. Jackson* 264

The Mentally Disabled and the Law ..... *Arthur B. Clark, Jr.* 265

Books Received 267

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Baton Rouge, Louisiana, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

$4.00 Per Annum **$1.50 Per Current Number**

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII MARCH 1962 NUMBER 2

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

JOHN W. DULANEY, JR., *Chairman*
Tunica

WALTER R. BRIDGFORTH
Yazoo City

FRED C. DeLONG
Greenville

JOE R. FANCHER, JR.
Canton

HUNTER M. GHOLSON
Columbus

WILLIAM F. GOODMAN
Jackson

CARROLL KEMP
Hazlehurst

W. CALVIN WELLS, JR.
Jackson

MISSISSIPPI STATE BAR
1961-62

OFFICERS

SHERWOOD W. WISE of Jackson.....President
C. SIDNEY CARLTON of Sumner.....First Vice-President
EATON A. LANG, JR. of Gulfport.....Second Vice-President
GENE A. WILKINSON of Jackson.....Public Relations Director
MRS. ALICE NEVELS of Jackson.....Secretary-Treasurer

COMMISSIONERS

ORMA R. SMITH.....Corinth
ALBERT SIDNEY JOHNSTON, JR.....Biloxi
LESTER F. SUMNERS.....New Albany
STANNY SANDERS.....Greenwood
JAY GORE, JR.....Grenada
HARRY L. CORBAN.....Fayette
K. HAYES CALLICUT.....Jackson
JAMES B. EVERETT.....Decatur
FRANK E. EVERETT, JR.....Vicksburg
RICHARD G. LORD, JR.....Meridian
WILLIAM H. BIZZELL.....Cleveland
HOMER W. PITTMAN.....Hattiesburg
JACK W. WALKER.....Mendenhall
J. MEREDITH WOOD.....Brookhaven
WILLIAM E. ANDREWS.....Purvis
J. WILMOT THOMPSON, JR.....Starkville
HERBERT M. FANT.....Sardis
GEORGE D. MAXEY.....Laurel

Mississippi Law Journal

VOLUME XXXIII MARCH 1962 NUMBER 2

PROOF OF DAMAGES TO PROPERTY IN TORT ACTIONS

*Ernest W. Graves**

I. Introduction

The problem of proving damage to property in tort actions has been troublesome to the Mississippi Supreme Court and to many attorneys in the state. The cases commented on herein illustrate problems involved in properly setting forth the elements of damage. No effort is being made to cover all such cases; the purpose of this article is only to illustrate the problems involved. Principally, the types of cases examined concern abatable nuisances connected with land and damage to vehicles. Obviously, eminent domain and right of access cases are not considered. Also, the subject of punitive damages is outside the scope of this analysis. This article, based on recent Mississippi Supreme Court decisions, is intended to outline some of the existing problems and to suggest the desirability of a uniform approach in solving them. It is submitted at the outset that the major problem is the failure of lawyers to appreciate the necessity for determining the elements and measure of damages before trial and the failure to frame pleadings, put on evidence, and secure instructions in a logical and consistent manner.

II. Proof of Damages to Land

In recent years several cases involving nuisances to land because of pollution of streams and air have been troublesome on the matter of damages.

In *Southland Company v. Aaron*[1] there was an action for damages allegedly sustained by the plaintiffs when oil from the defendant's refinery polluted the waters of a creek. The supreme court agreed that the operation of the refinery constituted a nuisance, but pointed out the shortcoming of the trial: "In none of the instructions granted to either of the parties was the jury furnished a guide as to the measure

*Welch, Gibbes and Graves, Laurel, Mississippi.

[1]221 Miss. 59, 72 So. 2d 161 (1954), 49 A.L.R. 2d 243 (1956).

of damages that the plaintiffs might be entitled to recover."[2] Then the court quoted with approval the following principle.

> It is the general rule that where the injury caused by the pollution is permanent and irreparable, the measure of damages is the difference in the market value of the property before and after the creation of the nuisance. But if the injury resulting from the pollution is of a temporary character, or if the nuisance is a temporary or abatable one, the measure of damages is the depreciation in the rental value of the property caused by the nuisance.[3]

According to the plaintiff's testimony, there was no permanent injury to the land. The court called attention to a rule previously set forth in Mississippi[4] and concluded that the plaintiffs were not entitled to recover the alleged difference in the value of their farm with a clear stream on it and with the same stream polluted. But there would be special damages for which the plaintiffs could recover if the proof sustained the allegations of such items as the loss of water by reason of pollution, the injury of the land by impoverishment of the soil, and damage to crops.

Since the nuisance was a temporary and abatable one plaintiffs could recover the depreciation in the rental value, or the value of use of the property, plus special damages if such could be proved. In order to prove their principal element of damages, it is submitted that the plaintiffs might have used a local cattle farmer or a county agent as a witness, securing his opinion as to the depreciation in rental value for the one year period before the pollution as compared to the dollar rental value after pollution.

The court further decided that if the defendant continued to pollute the stream, plaintiffs could again bring action. In a second action for continuation of a nuisance, the plaintiffs were held to be entitled to such punitive damages that would compel the defendant to abate the nuisance.[5] The court stated that the jury was amply justified in finding that the defendant had continued to pollute and contaminate the waters of Big Boguehoma Creek. Again, the evidence only showed temporary damage to plaintiffs' land and was held not sufficiently developed to have justified the verdict for $500 unless punitive damages were allowable. However, the court affirmed the judgment of the lower court, observing that the proof in the case did exceed bare nominal damages, and that the issue of punitive damages was properly sub-

---

[2]Southland Co. v. Aaron, 221 Miss. 59, 75, 72 So. 2d 161, 167 (1954).

[3]*Id.* at 76, 72 So. 2d at 167.

[4]Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892).

[5]Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 (1955).

mitted to the jury.[6] The *Southland* rule has been cited with approval in several subsequent cases.[7]

The measure of damages was well delineated in *Great Atlantic & Pacific Tea Company v. Mulholland*.[8] The owner of residential rental property sued the chain store for damages for an alleged nuisance caused by garbage being scattered from a bin at the rear of the store. Interestingly, the court commented that part of the plaintiff's testimony was inherently unbelievable, improbable, and unreasonable. Mrs. Mulholland claimed she had spent $4,680 cleaning up the garbage in her yard. She did not identify the persons employed, the rate of pay, nor the time spent in cleaning up. She simply testified that she had hired a boy on every other day for six years to clean up her yard and paid him $4 for each cleaning. Then she multiplied $4 by the number of times the yard was said to have been cleaned. The plaintiff's husband was allowed to testify about the value of the property before and after the nuisance arose. This was obviously an error since there was no proof that the property had been permanently damaged. The opinion included the following language:

> The trouble here is the kind of proof offered in support of damages. It may not be shown by proving what rent was collected before the nuisance and what rent was collected thereafter. The proper way to prove depreciation in rental value, and probably the only way, although we do not so decide, is by the testimony of a qualified person as to the reasonable market rental value without the nuisance, and the reasonable market rental value after the creation of the nuisance; and since this suit covers a six year period, it should be likewise proven for each separate year, because rental values may vary with the years.[9]

When one reads the three chapters of *Long v. Magnolia Hotel Company*[10] in its three visits to the appellate court, the conclusion is inescapable that both counsel and court were sorely troubled and confused about measure of damages. Although few lawyers ever will be

---

[6]On the third appearance of the case, there was an affirmance *per curiam*. Southland Co. v. Aaron, 225 Miss. 311, 83 So. 2d 764 (1955).

[7]Alabama Great So. R.R. Co. v. Broach, 238 Miss. 618, 119 So. 2d 923 (1960); Cooper Tire and Rubber Co. v. Johnston, 234 Miss. 432, 106 So. 2d 889 (1958); Magnolia Petroleum Co. v. Stinson, 230 Miss. 533, 93 So. 2d 815 (1957); City of Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956); Ginther v. Long, 227 Miss. 885, 87 So. 2d 286 (1956); Great Atl. & Pac. Tea Co. v. Mulholland, 226 Miss. 449, 84 So. 2d 504 (1956); Shaw v. Owen, 229 Miss. 126, 90 So. 2d 179 (1956); Southland Co. v. McDonald, 225 Miss. 19, 82 So. 2d 448 (1955).

[8]226 Miss. 499, 84 So. 2d 504 (1956).

[9]Great Atl. & Pac. Tea Co. v. Mulholland, 226 Miss. 499, 512, 84 So. 2d 504-507-08 (1956).

[10]227 Miss. 625, 86 So. 2d 493 (1956); 236 Miss. 655, 111 So. 2d 645 (1959); 114 So. 2d 667 (1959).

confronted with a situation where original tornado damage is later aggravated by bricks falling on the roof of the plaintiff's restaurant while wrecking operations are being carried on by workmen of the defendant hotel, it is submitted that the rule enunciated in this case leaves much to be desired:

> It has always been the rule in this state that in a tort action to recover damages done to the property the amount recoverable is the aggregate of the damages that resulted from the tort itself, except in a proper case for punitive damages, and we do not think that this is such a case.[11]

Another celebrated dispute concerning proof of damages to land appears in *City of Oxford v. Spears*.[12] In this case a land owner sued the municipality for allegedly maintaining a nuisance by raw sewage pollution of a water course running through his land. On appeal the lower court judgment was affirmed as to liability but reversed and remanded for a new trial on the issue of damages only. The decision was consistent with the *Southland* rule: Where the proof concerning pollution, which made the water unfit for the plaintiff's cattle to drink, indicated that there was an abatable nuisance, the damages should have been limited to the depreciation of the rental or usable value of the land for the six year period ending with the filing of the suit, plus any special or incidental damages proved. In ordering a new trial, the court suggested that the plaintiff might be able to prove annoyance, discomfort, inconvenience, and sickness as special or incidental damages separate and distinct from the depreciation element. The most important question presented was whether the loss of business profits in the cattle business was a proper element of damages. The court held that it was not.

Nuisance can stem from many sources other than oil, garbage, and sewage. For instance, in *Shaw v. Owen* a suit was brought for an injunction to abate an alleged nuisance in the operation of a cotton gin and for resulting damages allegedly sustained.[13] The principal question was whether the damages involved had to be proved in terms of money. The court declared that certain kinds of damages must be proved in terms of money, including depreciation in the value of real property when the injury is permanent and depreciation of the rental or usable value during the continuation of the nuisance when the injury is temporary or remedial. The decision emphasized that in cases where the damages are for annoyance, inconvenience, discomfort, and

---

[11]Long v. Magnolia Hotel Co., 236 Miss. 655, 665, 111 So. 2d 645, 649 (1959). Apparently the decision was based on something other than the suggested formula. To examine this case only in a cursory manner is urged to prevent one from becoming discouraged on properly applying measure of damages.

[12]228 Miss. 433, 87 So. 2d 914 (1956).

[13]229 Miss. 126, 90 So. 2d 179 (1956).

sickness, it is not necessary to make proof in terms of money. If the nuisance complained of involves the violation of a right, recovery may be had even though the damages are not ascertainable. Therefore, there are many types of compensable damages to real property which are not susceptible of proof in terms of dollars and cents. By way of comparison with personal injury litigation, the court asked, "How could one prove in terms of money the value of pain and suffering, or loss of society and companionship?"

Closely following the *Shaw* case was *Cooper Tire & Rubber Company v. Johnston*, where the same measure of damages was applied to industrial atmospheric pollution.[14] The appellants contended that there was no competent testimony by qualified witnesses concerning the depreciation in the rental or usable value of the appellee's property. The contention appears sound. Nonetheless, an award of $500 for personal annoyance, inconvenience, and discomfort was held supported by the record. Also, the court upheld damages of $3,600 consisting of depreciation in rental value based on seemingly vague testimony about the cost of repainting.[15] It is submitted that the rule was not properly applied in this case in allowing an estimate of a painting job to support the verdict. Also, a witness who was an attorney and licensed real estate broker testified that the actionable nuisance created by the appellants' plant substantially decreased the rental value or value of the use of appellee's property during the period in question. Obviously, real proof of damages was sadly lacking.

In *Alabama Great Southern Railroad Company v. Broach*, there was an alleged discharge of excess surface water on the plaintiff's property.[16] The court found that the instruction on damages failed to furnish the jury any guide for measuring damages in surface water cases. The case was reversed and remanded.

Again, it may be stated that the above cases principally concern the measure of damages to real property where there occurred an abatable nuisance with temporary, and not permanent damages. In some ways, it seems more difficult to prove the lesser and temporary evil than the greater and permanent one. With some exceptions, the ground rules on proving damages to land have been stated effectively by the court.

III. Proof of Damages to Vehicles

Proof of damages to vehicles often tends to be a haunting enigma, as is illustrated by a few recent decisions. In *National Fire Ins. Co. of*

---

[14]234 Miss. 432, 106 So. 2d 889 (1958).

[15]Carbon black from a rubber plant had made greasy deposits on the plaintiff's buildings.

[16]238 Miss. 618, 119 So. 2d 923 (1960).

Hartford v. Slayden, substantial guides are provided.[17] The insured brought suit against his insurer under a policy which covered a bulldozer for direct loss or damage by theft. To prove the necessity of repairs, the plaintiff called a mechanic as an expert witness but did not call the one who had repaired the machine. There was a stipulation that the cost of repair was reasonable. The court observed that the evidence was not sufficient to establish the necessity for repairs made to the bulldozer, and the case was sent down for a new trial on the issue of damages only. The plaintiff's error was in failing to prove that the repairs were a necessary result of the wrongful act of the defendant. The court suggested that the necessity and the reasonableness of the cost could best be shown by the mechanics who did the repair work.

The plaintiff's attorney will often appear in court with repair estimates or bills and try to secure opposing counsel's stipulation. If unsuccessful in that endeavor, he certainly should be prepared to furnish the essentials of proof. Those essentials are clearly set forth in the *National Fire* case where the costs of repairs are relied upon as the measure of damages. Apparently, plaintiff can utilize another method to show the measure of damage to his vehicle. It would be necessary to show the difference between the fair market value of the vehicle before the accident, as compared with the fair market value afterward.[18] There is an option to prove the measure of damages either by the cost of repair method or the value method. Of these two, the latter may be better because depreciation can be included. If depreciation is not a factor, then the cost of repair method is probably to be preferred since it is relatively easy and certainly is more impressive to the average juror.

Various complications can arise from both sides of the counsel table on the matter of damages. In *Greyhound Corp. v. Townsend*, the court explained that while the plaintiff introduced a copy of the repair bill from the repairman, there was no evidence of the necessity for the repairs or the reasonableness of the repairs.[19] The principles laid down in the *National Fire* case, and followed in *Brown and Root, Inc. v. Continental Southern Lines*,[20] were confirmed. On suggestion of error in the *Greyhound* case, the court decided that where the automobile owner offered in evidence a copy of a bill for the actual repairs and there was no defense objection, the defendant thereby waived its right to demand proof supporting the necessity for and reasonableness of costs of repairs.

---

[17]227 Miss. 285, 85 So. 2d 916 (1956).

[18]See 15 AM. JUR. *Damages* § 124 (1956).

[19]234 Miss. 839, 108 So. 2d 208, 108 So. 2d 853 (1959).

[20]228 Miss. 15, 87 So. 2d 257, 87 So. 2d 926 (1956).

Similarly, in *Tynes v. McClendon*[21] the plaintiff testified that Pittman Ford Company repaired his damaged car. When the repair estimate sheet was offered in evidence, defense counsel objected saying that plaintiff, having stated that he fixed it, could tell what it cost. The witness then said that it cost $296.56. The court decided that the response complied exactly with the defense counsel's suggestion, and that under the circumstances, there was no occasion for the application of the principals announced in the *National Fire* case, which required proof of the necessity of the repairs and reasonableness of the cost.

The case of *Calvert Fire Insurance Co. v. Newman*[22] illustrates the second method of ascertaining damage to vehicles. In this case apparently there was no evidence introduced to support a finding that the damage to the automobile caused it to be a total loss. The insurance company introduced undisputed testimony that the automobile could be repaired with at least substantial restoration to complete functioning. The court held that the measure of damages in such circumstances is the difference between the reasonable market value prior to the accident as compared to the reasonable market value after all reasonable and feasible repairs have been made. Despite the repairs, if there remains a loss in actual market value, such deficiency may be added to the cost of the repairs. Presumably, the court meant repairs for which the costs are reasonable. Naturally, from that figure, there would have to be subtracted any insurance policy deductible amount.

Perhaps one of the most helpful cases on the subject of damaged vehicles is the case of *National Dairy Products Corp. v. Jumper*,[23] where a cow strayed from a pasture at night and into the path of plaintiff's tractor-trailer. Several rules were promulgated.

1. Cost of repairs is ordinarily the proper measure of damages where a commercial vehicle is damaged.

2. If the owner has lost the use of the vehicle during the time of repair, he is entitled to recover the value of use during such period.

3. In an effort to avoid and mitigate his damages, the owner is obligated to make an effort to rent a similar substitute unit during the time of repair. The loss of use is measured by the reasonable rental value of such similar unit.

4. If, after diligent efforts, the owner finds that no such unit is available for rent in the area, he may still recover rental value for such period; or, in the alternative, and under the same circumstances, if the owner produces evidence of sufficient probative value to mea-

---

[21] 235 Miss. 336, 108 So. 2d 716 (1959).

[22] 124 So. 2d 686 (Miss. 1960).

[23] 130 So. 2d 922 (Miss. 1961).

sure adequately and clearly loss of profits during such period, such may be recovered. Otherwise the loss of profits method is not allowable.

The decree of the chancery court was affirmed as to appellant's liability and as to the stated amount for cost of repairs to the tractor. It was reversed insofar as it awarded damages for loss of use measured by loss of profits and was remanded for a determination of damages for loss of use in accord with the above stated rules.

IV. Conclusion

Proof of damages to property is not an exceedingly difficult matter. As indicated previously, the difficulty apparently arises because of the failure of trial counsel to realize the necessity for precision in determining the proper measure of damages and in offering the proper type of evidence in support of such damages.

The foregoing cases point out perhaps most of the troublesome problems. With only a few exceptions, the court explicitly has set out the requirements and methods available for proving damage. It remains for the lawyer to avail himself of the guideposts and to thereby avoid the ominous "reversed on the question of damages and remanded for a trial on that question only."

SOME ANIMADVERSIONS ON LAND LINE CASES

*Robert G. Gillespie**

I. The Problems Created: Ill Will, Threats and Shotguns

When one in our profession speaks of a lawsuit as interesting, he usually has reference to a rule of law not often encountered or a unique application of some rule. But some cases are interesting because of the people involved and the way they act. While some land line cases are treated by the parties as ordinary disputes, the majority are in a class to themselves in revealing human nature. Few lawyers engaged in the general practice have escaped being involved in one or more of these interesting and often exasperating cases.

Cases arising out of land line disputes take the form of various kinds of civil actions, including ejectment, suits to confirm and quiet title, injunction suits, and suits in trespass for recovery of statutory penalty. Some involve contempt citations for violation of injunctions. Such disputes also lead to criminal prosecutions for murder, assault and battery, and assault with intent.

Whatever the form of action, land line cases usually generate a lot of heat and sometimes violence. These disputes involve the ownership of strips of land often only a few inches wide. For one reason or another, the narrower the strip of land in dispute, the more intense the feeling between the parties. Also, the less the property in dispute is worth, the greater the hostility. Before the case reaches the lawyers, angry words have usually passed between the parties. Sometimes a gun has been drawn, and before the case is over, a fight is not unusual. Now and then a party takes a "pot-shot" at his adversary; homicides are not unknown. Brother has slain brother; kin have fought kin; and neighbor has killed neighbor. It sometimes happens that the best and most reasonable citizen becomes involved in a land line suit, and nothing herein is intended to criticize or poke fun at such unfortunate persons. No man should be criticized for defending his rights.

It is not uncommon for neighbors to live peacefully side by side for years and then become embroiled in a land line suit that develops into a blood feud. Many of these disputes have their genesis in areas other than real estate. A man once went to a lawyer's office for the purpose of employing him in a land line suit involving an insignificant strip of land. The case itself is not of interest, but the way it started is. This man had lived peacefully with his neighbor for years until one day the neighbor blocked his driveway, and they had an argument about this incident. The bad feeling generated by this incident continued

*Associate Justice, Supreme Court of Mississippi, Jackson, Mississippi

even after they had no existing issue about which to argue. They found an issue when they began disputing the land line which was in possession of one and to which the other made claim. If they had not had the argument about the parking incident, it is probable that they would never have thought of the land line issue.

When the case involves property of little value, the lawyers can hardly be expected to fix fees on the basis of the amount in dispute. The litigant is usually willing to pay an adequate fee in order to carry his point as a matter of principle. At least he leads himself to think it is a matter of principle. I once knew a lawyer who, before accepting a case involving a land line, carefully interrogated his prospective client. If it appeared that the parties were merely using the land line dispute as an excuse to carry on a feud, the lawyer would demand a fee large enough to adequately compensate for all eventualities.

Suits of this kind often draw the neighborhood into the controversy. This is usually true when the neighbors testify, for it is well known that witnesses have a tendency to adopt the cause of the party on whose side they testify. No matter how weak a case one has, he can usually find some neighbor to testify favorably for him on some aspect of the case.

In a case finally disposed of in the supreme court, a young man bought a home and decided to fence his back yard. A lady living next door decided the proposed fence would take in a strip of her property and an argument developed. The young man was in his backyard when the lady came out of the house with a shotgun. He fled to his house and just as he bolted through his back door the lady fired. She missed the man but played havoc with the door facing. The man ran away to fight (in court) another day and he won.

II. Common-sense Solutions: Chancellor Amis, Judge Griffith, and a Country Preacher

The late Chancellor A. B. Amis, Sr. tried a case involving a two inch strip of city property. The owner of a city lot erected a building thereon, and the footing of the foundation encroached two inches on the adjoining lot. In his suit, the owner of the adjoining lot sought removal of the encroachment which did not rise above ground level. Incidentally, the encroachment came about because the engineer who surveyed the lot for the purpose of constructing the building used as a starting point the side instead of the center of a four inch pipe which was the stake marking the corner of the lot. Chancellor Amis dismissed the suit with remarks characteristic of that great chancellor. It is recalled that he said something about *de minimis non curat lex*. At any rate, he let the complainant know that no relief was forthcoming in his court.

Chancellor Amis tried another case involving a small strip of land claimed by a prominent white man and an aged Negro woman. In deciding the case for the Negro woman, Chancellor Amis used strong language in letting the white man know he did not believe a word of his testimony. The Chancellor laid his whittling knife and piece of cedar on the bench, and, pointing his finger at the white man, said in a crisp and commanding voice, "Sir, your testimony does not bear the stamp of truth." Lawyers who practiced before Chancellor Amis remember him for such denunciations of untruth as well as for his industry and greatness of mind.

The late Chief Justice V. A. Griffith, when he was chancellor, had a case before him involving a small strip of land in a remote area of the country. He decided to view the premises and found that the disputed strip was in a dry creek bed. When he got back to the courthouse he called the litigants and their attorneys into conference and told them if they would call off their foolish lawsuit over the worthless dry creek bed, he would personally pay the costs.

A country preacher, the most peaceful of men, had two neighbors who fell into a dispute over their land lines. It was a neighborhood of small farmers. One of the preacher's neighbors employed a surveyor who found the governmental survey lines between the preacher's two neighbors were about 120 feet south and 70 feet east of what had been understood as the line for at least a couple of generations. Both the disputing neighbors moved their fences accordingly, each taking into his property 120 feet to the south and 70 feet to the east. This resulted in one neighbor's moving in on the preacher and taking 120 feet off his north side and another neighbor's moving in and fencing in 70 feet off the preacher's west side. By the time these fences were built, the whole neighborhood was in an uproar about land lines and the interested parties began consulting lawyers. Up until this time the farmers had given no consideration to adverse possession and long established fences and hedge rows. Those who relied on adverse possession prevailed, but the preacher, having no desire or inclination to dispute with his neighbors, just sold out and moved away.

Back in 1939, I sat as chancellor in a land line case involving a strip of land some thirty feet wide across a fourth acre tract. The land line, as it developed in the trial, had been established for many times the statutory period, but a surveyor found that the governmental survey line ran thirty feet west of the established line. The party who stood to gain the thirty foot strip in accordance with the survey tore the fence down and built one through his neighbor's corn field on the newly surveyed line. Instead of using wire, he built the fence with steel cable fastened to king size posts, apparently thinking a strong fence would help defend his newly acquired territory. It was to no avail,

for he had to tear down what he had so laboriously and expensively built.

Everyone has seen or at least heard of a spite fence. I know of and have seen many times one such fence located four feet from the house whose owner was the object of the ire of the builder of the spite fence. This spite fence is made of concrete and extends to the eaves of the house. Many land line cases are cut of the same cloth as spite fences.

III. Inaccurate Decrees

Since land line cases often involve considerable wear and tear on the emotions and the persons of the parties involved, it is desirable that the final decree be clear and accurate in not only describing the property involved, but in relating the decree to monuments on the ground. This serves to avoid the possibility of further misunderstanding as to where the line is located on the ground. In this connection, it is desirable, even imperative in some cases, that the decree be something more than a "paper decree." Trees, fences, wood stakes, ditches and the like disappear with time, and if the line described in the decree is related to such markers another lawsuit will likely follow in due time. Some decrees settle the issue only on paper and only for the time being.

Once in a while the line fixed in the decree is incorrect. Such a case was decided by the supreme court, although not reflected in the report of the case. After affirmance in the supreme court, the line was run on the ground, and it developed that the successful party not only had a decree confirming his title to the disputed strip of land but the other party's dwelling as well. He had never claimed the house. Let it be said to the credit of the successful party that he voluntarily deeded the house to the loser. No one can say that he is not a reasonable man. It would probably have made an interesting case if he had refused.

While it was not a typical land line suit, the case of *Tillery v. Vines*[1] illustrates the necessity of a proper survey and the relation of the decree to the situation existing on the ground. In 1918 the father of appellants was granted a decree confirming and quieting title. Appellants were granted a decree again adjudicating title and enjoining appellees from interfering with appellant's use and enjoyment of the property in 1955. Four years later, appellants moved for a citation of appellees for contempt and other relief, and various issues were made by the original bill, the answer, and the cross-bill. As indicated in the opinion, it turned out that the "land," which had been the subject of three lawsuits over a period of forty years, did not exist.

---

[1]131 So. 2d 191 (Miss. 1961).

IV. Suggested Procedure for the Trial of Land Line Cases

Chancellor Amis advocated a procedure for the trial of land line cases in chancery court which, if followed, would eliminate errors in the decree and avoid the possibility of future litigation. An outline of this procedure follows.

1. After the original bill has been answered and the pleadings have been settled, the chancellor would appoint a competent surveyor with appropriate directions, the charges to be taxed as costs. The surveyor would acquaint himself with the issues as made by the pleadings, all pertinent deeds, and any other information needed in making the survey.

2. The surveyor then would go upon the land, make the survey, and place temporary stakes marking the two lines contended for by the parties. He would prepare a map showing the disputed area, the line contended for by each party, and all artificial or natural markers or objects to which the witnesses might refer. The map should show as a point of reference some proved starting point. The map would be filed among the papers.

3. Each party may, if he chooses to do so, employ his own surveyor who may make his own map.

4. The chancellor would hear the case, render a written finding, and enter an interlocutory decree directing the surveyor to place permanent markers on the line determined to be the true line.

5. After following such directions the surveyor would make a brief report showing the kind and location of the markers placed on the ground.

6. The chancellor would enter a final decree, making appropriate reference therein to the kind and location of the permanent markers.

It is obvious that this procedure would not be suitable or useful in all land line cases. This procedure may be adopted in whole or in part, depending on the particular problems of the case. In some cases it may clarify the testimony of witnesses if they see the two lines of temporary stakes before testifying. It insures accuracy in determining the true line, and proper reference in the final decree to permanent markers on the ground avoids subsequent disputes.

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—II†

*William P. Murphy**

EARLY RATIFICATIONS

The Constitution in Pennsylvania.

At the beginning the Constitution had smooth sailing. To Delaware went the honor of being first to ratify, its convention adopting the Constitution unanimously on December 7, 1787. On December 12, Pennsylvania's convention ratified by a two to one majority. New Jersey followed suit on December 18 with a unanimous ratification. On January 2, 1788, Georgia's convention gave unanimous acceptance. On January 9, Connecticut ratified by a convention majority of three to one. In little more than a month, five states—a majority of the nine necessary to put the Constitution into operation—had ratified. They had done so, moreover, without formally recording any objections or proposing any amendments to the Constitution. In three of the states—Delaware, New Jersey and Georgia—there was apparently no debate in the conventions and the ratifications were unanimous. In Connecticut, only fragments of the convention debates have been preserved, and will be noted later. The only real opposition which was recorded was in Pennsylvania, and since the records of the ratification in Pennsylvania are relatively extensive, they will be examined at some length.

The Pennsylvania legislature, on September 29, enacted a resolution designating the first Tuesday in November for the election of delegates to a state convention. Nineteen members of the legislature, all opposed to the Constitution, sought to prevent this action by absenting themselves and thus destroying a quorum. They were forcibly taken from their lodgings, dragged to the statehouse, and there detained against their wills in order to reconstitute the necessary quorum. After adjournment, the minority promptly published an address to the people, in which they protested against the indignity visited upon them,

---

† This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L. J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L. J. 135 (1959); 30 Miss. L. J. 261 (1959); and 31 Miss. L. J. 50 (1959); continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L. J. 203 (1960); 32 Miss. L. J. 1 (1960); 32 Miss. L. J. 155 (1961); and 32 Miss. L. J. 227 (1961); and continued with *State Sovereignty and the Ratification of the Constitution*, 33 Miss. L. J. 29 (1961)

* Professor of Law, University of Mississippi.

and also proceeded to attack the Constitution. Among the grounds were that the delegates to the Convention had no authority "to annihilate the present confederation and form a constitution entirely new," that under the Constitution the state government would be annihilated or "dwindle into a mere corporation," and that the judiciary of the United States was "so constructed as to absorb and destroy the judiciaries of the several states."[166]

The elections of November 6 were a resounding victory for the Federalists. When the convention met on November 21, the result was a foregone conclusion. The lines were sharply drawn numerically. The majority never received more than forty-six votes on any motion during the convention, the minority never less than twenty-three, and no vote varied more than one or two from this division. The Anti-Federalists were determined, however, to articulate their opposition, which they did through their principal spokesmen John Whitehill, William Findley, and John Smilie. The Federalist leaders were James Wilson and Thomas McKean, chief judge of the supreme court of Pennsylvania.

On Saturday, November 24, McKean moved the adoption of the Constitution and Wilson led off with an opening speech in support, "as the only member of this respectable body who had the honor of a seat in the late Federal Convention." After reviewing the situation of the states, Wilson said that "In this dilemma, a Federal Republic naturally presented itself to our observation, as a species of government which secured all the internal advantages of a republic, at the same time that it maintained the external dignity and force of a monarchy. The definition of this form of government may be found in Montesquieu, who says, I believe, that it consists in assembling distinct societies which are consolidated into a new body, capable of being increased by the addition of other members."[167] In the creation of this Federal republic, Wilson stated that "perhaps the most important obstacle to the proceedings of the Federal Convention, arose in drawing the line between the national and the individual governments of the states. On this point a general principle readily occurred, that whatever object was confined in its nature and operation to a particular state, ought to be subject to the separate government of the states; but whatever in its nature and operation extended beyond a particular state, ought to be comprehended within the federal jurisdiction. The great difficulty, therefore, was the application of this general principle, for it was found impracticable to enumerate and distinguish the various objects to which it extended; and as the mathematics only are capable

[166] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 77-78 (McMaster & Stone eds. 1888).

[167] *Id.* at 220-21.

of demonstration, it ought not to be thought extraordinary that the convention could not develop a subject involved in such endless perplexity."[168]

Notwithstanding the impossibility of exact enumeration, Wilson said the general principle was clear that in proposing a federal republic the Convention had "not only to consider the situation, circumstances, and interests of one, two, or three states, but of the collective body; and as it is essential to society, that the welfare of the whole should be preferred to the accommodation of a part, they followed the same rule in promoting the national advantages of the Union, in preference to the separate advantages of the states."[169] Wilson then offered a term which he called "federal liberty," which, he said, "consists in the aggregate of the civil liberty which is surrendered by each state to the national government; and the same principles that operate in the establishment of a single society, with respect to the rights reserved or resigned by the individuals that compose it, will justly apply in the case of a confederation of distinct and independent states."[170]

The first two days of the next week were occupied with the discussion of procedural matters. On Wednesday, the opponents of the Constitution began their attack. Smilie opened up with a criticism based on the absence of a "full and explicit declaration of rights," asserting that "So loosely, so inaccurately are the powers which are enumerated in this constitution defined, that it will be impossible, without a test of that kind, to ascertain the limits of authority, and to declare when government has degenerated into oppression. In that event the contest will arise between the people and the rulers. 'You have exceeded the powers of your office, you have oppressed us,' will be the language of the suffering citizens. The answer of the government will be short—'We have not exceeded our power; you have no test by which you can prove it.' "[171]

Then Whitehill joined in the attack. "But let us attend to the language of the system before us. 'We the people of the United States,' is a sentence that evidently shows the old foundation of the union is destroyed, the principle of confederation excluded, and a new and unwieldy system of consolidated empire is set up, upon the ruins of the present compact between the states. Can this be denied? No, Sir. It is artfully, indeed, but it is incontrovertibly designed to abolish the independence and sovereignty of the states individually."[172] Whitehill spent considerable time criticising the latitude of the powers of Congress. "That govern-

[168] *Id.* at 223-24.
[169] *Id.* at 226.
[170] *Id.* at 227.
[171] *Id.* at 255.
[172] *Id.* at 256-57.

ment which possesses all the powers of raising and maintaining armies, of regulating and commanding the militia, and of laying imposts and taxes of every kind, must be supreme, and will (whether in twenty or in one year, it signifies little to the event) naturally absorb every subordinate jurisdiction . . . we shall find, in a single line, sufficient matter for weeks of debate, and which it will puzzle any one member to investigate and define. But, besides the powers enumerated, we find in this constitution an authority is given to make all laws that are necessary to carry it effectually into operation, and what laws are necessary is a consideration left for Congress to decide . . . The giving such extensive and undefined power is a radical wrong that cannot be justified by any subsequent merit in the exercise . . . Then, Sir, can it longer be doubted that this is a system of consolidation?"[173]

In answer to this assault, Wilson said that "The inference . . . appears rather unnatural that a government should be expressly calculated to produce the destruction of other governments upon which its own existence must entirely depend . . . Is it not evident, Sir, when we particularly examine the structure of the proposed system, that the operation of the federal legislature necessarily presupposes the existence of the legislatures of the several states? . . . Thus, Mr. President, by a clear deduction, it is evident that the existence and efficiency of the general government presupposes the existence and full operation of the separate governments . . . I trust it is unnecessary to dwell longer upon this subject; for, when gentlemen assert that it was the intention of the federal convention to destroy the sovereignty of the states, they must conceive themselves better qualified to judge of the intention of that body than its own members, of whom not one, I believe, entertained so improper an idea."[174]

Smilie made a rebuttal to Wilson. "I think however, Mr. President, it has been clearly argued, that the proposed system does not directly abolish the governments of the several states, because its organization, and, for some time, perhaps, its operations, naturally pre-suppose their existence. But, Sir, it is not said, nor is it thought, that the words of this instrument expressly announce that the sovereignty of the several states, their independence, jurisdiction, and power, are at once absorbed and annihilated by the general government. To this position and to this alone, the arguments of the honorable gentlemen effectually reply, and there they must undoubtedly hold as long as the forms of state government remain, at least, till a change takes place in the federal constitution. It is, however, upon other principles that the final destruction of the individual governments is asserted to be a necessary consequence of their association under this general form,—for, Sir, it is

[173] *Id.* at 259-61.

[174] *Id.* at 264-65.

the silent but certain operation of the powers, and not the cautious, but artful tenor of the expressions contained in this system, that can excite terror, or generate oppression. The flattery of language was indeed necessary to disguise the baneful purpose. . . ."[175]

The preamble to the Constitution was enough to disclose its purpose to Smilie. ". . . [W]hen it is declared that 'We the people of the United States do ordain and establish this constitution,' is not the very foundation a proof of a consolidated government, by the manifest subversion of the principle that constitutes a union of states, which are sovereign and independent, except in the specific objects of confederation? These words have a plain and positive meaning, which could not be misunderstood by those who employed them; and therefore, Sir, it is fair and reasonable to infer, that it was in contemplation of the framers of this system, to absorb and abolish the efficient sovereignty and independent powers of the several States, in order to invigorate and aggrandize the general government. The plan before us, then, explicitly proposes the formation of a new constitution upon the original authority of the people, and not an association of states upon the authority of their respective governments."[176] Smilie then supported Whitehill's argument on the dangerous amplitude of national powers.

The rejoinder to Smilie was made by Judge McKean, "This system proposes a union of thirteen sovereign and independent states, in order to give dignity and energy to the transaction of their common concerns; it would be idle therefore to countenance the idea that any other powers were delegated to the general government than those specified in the constitution itself. . . . Sir, there is not a power given in the article before us that is not in its expression, clear, plain, and accurate, and in its nature proper and absolutely necessary to the great objects of the union."[177] Referring to the taxation power, McKean asked: "What is there, however, that should render it a more dangerous trust in the hands of the general than of a particular government; for, is it not as much in the power of the state legislatures at this day to do all this mischief, as it will be hereafter in the power of Congress? . . . For my part, Sir, I can perceive that the power is absolutely necessary to support the sovereignty and preserve the peace of the union, and therefore, I will not idly argue against its use, from the possible abuse. . . ."[178] Referring to all the powers of the national government, he added, "Nor am I, Sir, impressed with the opinion which has given so much pain to the worthy gentlemen in the opposition, that the powers are so vaguely expressed, so indefinite and extensive in their nature, that they

---

[175] *Id.* at 267.
[176] *Id.* at 268.
[177] *Id.* at 272-74.
[178] *Id.* at 274-76.

may hereafter be stretched to every act of legislation, and construed to imply something beyond what is here specified."[179] After all, McKean reminded, ". . . the people will, from time to time, have it in their power to remove those persons who have promoted any measure that tends to injure and oppress them. In short, Sir, it seems that the honorable members are so afraid the Congress will do some mischief, that they are determined to deny them the power to do any good."[180]

On Friday, November 30, Whitehill pressed the point in another speech. "I have said, and with increasing confidence I repeat, that the proposed constitution must eventualy annihilate the independent sovereignty of the several states . . . For, Sir, the first article comprises the grants of powers so superlative in their nature, and so unlimited in their extent, that without the aid of any other branch of the system, a foundation rests upon this article alone, for the extension of the federal jurisdiction to the most extravagant degree of arbitrary sway. It will avail little to detect and deplore the encroachments of a government clothed in the plenitude of these powers . . . It is not alone, however, the operative forces of the powers expressly given to Congress that accomplish their independence of the states, but we find an efficient auxiliary in the clause that authorizes that body 'to make all laws which shall be necessary and proper,' etc. . . . That it was the design of the late federal convention to absorb and abolish the individual sovereignty of the states, I seek no other evidence but this system. . . ."[181]

The debate was equally lively the next day, Saturday, December 1. Benjamin Rush started it off by saying, in effect, that he was glad to be getting rid of state sovereignty. "On the subject of the new government tending to abridge the states of their respective sovereignty," he observed that "this passion for separate sovereignty had destroyed the Grecian Union. This plurality of sovereignty is in politics what plurality of gods is in religion—it is the idolatry, the heathenism of government."[182] He then proceeded to summarize the advantages of the Constitution in what was described as "an animated speech." Findley immediately took the floor and noted that while Rush was the only one who had responded to the charge of consolidation, the substance was that he had "insinuated that he saw and rejoiced at the eventual annihilation of the state sovereignties."[183]

Findley then "delivered an eloquent and powerful speech, to prove that the proposed plan of government amounted to a consolidation, and not a confederation of the states." He argued that "the proposed con-

---

[179] *Id.* at 276.
[180] *Id.* at 274.
[181] *Id.* at 284-87.
[182] *Id.* at 299-300.
[183] *Id.* at 300.

stitution established a general government and destroyed the individual governments, from the following evidence taken from the system itself. 1st. In the preamble, it is said, *We the People*, and not *We the States*, which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power, and delegating a portion of that power for their common benefit. 2nd. That in the legislature each member has a vote, whereas in a confederation, as we have hitherto practiced it, and from the very nature of the thing, a state can have only one voice, and therefore all the delegates of any state can only give one vote. 3rd. The powers given to the Federal body for imposing internal taxation will necessarily destroy the state sovereignties, for there cannot exist two independent sovereign taxing powers in the same community, and the strongest will of course annihilate the weaker. 4th. The power given to regulate and judge of elections is a proof of a consolidation, for there cannot be two powers employed at the same time in regulating the same elections, and if they were a confederated body, the individual states would judge of the elections, and the general Congress would judge of the credentials which proved the election of its members. 5th. The judiciary power, which is co-extensive with the legislative, is another evidence of a consolidation. 6th. The manner in which the wages of the members is paid, makes another proof. And lastly, the oath of allegiance directed to be taken establishes it incontrovertibly; for would it not be absurd, that the members of the legislative and executive branches of a sovereign state should take a test of allegiance to another sovereign or independent body?"[184]

Wilson then made answer by opposing the doctrine of state sovereignty with the doctrine of popular sovereignty. "Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly that there can be no subordinate sovereignty. Now if there can not, my position is, that the sovereignty resides in the people. They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare. This constitution stands upon this broad principle. I know very well, Sir, that the people have hitherto been shut out of the federal government, but it is not meant that they should any longer be dispossessed of their rights . . . When the principle is once settled that the people are the source of authority, the consequence is that they may take from the subordinate governments power with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle called state governments; they can also

[184] *Id.* at 300-01.

furnish another proportion to the government of the United States. Who will undertake to say as a state officer that the people may not give to the general government what powers and for what purposes they please? How comes it, Sir, that these state governments dictate to their superiors—to the majesty of the people? . . . As this government is formed, there are two sources from which the representation is drawn, though they both ultimately flow from the people. *States* now exist and others will come into existence; it was thought proper that they should be represented in the general government. But gentlemen will please to remember, this constitution was not framed merely for the states; it was framed for the PEOPLE also. . . ."[185]

On Tuesday, December 4, Wilson made a lengthy speech in which he answered the criticisms of the opposition and extolled the virtues of the Constitution. Referring to Findley, Wilson said "His position is, that the supreme power resides in the states, as governments, and mine is, that it resides in the PEOPLE, as the fountain of government . . . I agree with the members in opposition, that there cannot be two sovereign powers on the same subject. I consider the people of the United States as forming one great community, and I consider the people of the different states as forming communities on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects . . . State sovereignty, as it is called, is far from being able to support its weight. Nothing less than the authority of the people could either support it or give it efficacy . . . My position is, Sir, that in this country the supreme absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments, but that the fee simple continues, resides and remains with the body of the people . . . Because this recognition is made in the proposed constitution, an exception is taken to the whole of it, for we are told it is a violation of the present confederation—a CONFEDERATION OF SOVEREIGN STATES. . . . I am astonished to hear the ill-founded doctrine, that states alone ought to be represented in the federal government, these must possess sovereign authority forsooth, and the people be forgot! No; let us *reascend* to first principles."[186]

Wilson also undertook in this speech to discuss the division of power between nation and states. "Sir, I think there is another subject with regard to which this constitution deserves approbation. I mean the *accuracy* with which the *line is drawn* between the powers of the *general government*, and that of the *particular* state governments. We have

[185] *Id.* at 301-05.

[186] *Id.* at 315, 341.

heard some general observations on this subject, from the gentlemen who conduct the opposition. They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as limited and defined. They have already been answered by my honorable colleague (Mr. McKean) therefore, I shall not enter into an explanation; but it is not pretended, that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible, and will also discover that the general clause, against which so much exception is taken, is nothing more than what was necessary to render effectual the particular powers that are granted."[187]

On Wednesday, December 5, Findley made a long speech in which he discussed "the amount of sovereignty it was safe for the states to give up; how much the Constitution would take from them; and ended with an appeal for a *federal* in preference to a *consolidated* government."[188] On Friday, December 7, Wilson made a speech defending the judicial power of the United States under the Constitution. In the course of this address he discussed the clause extending the judicial power to "controversies to which the United States shall be a party." "Now I apprehend it is something very incongruous that, because the United States are [*sic*] a party, it should be urged as an objection, that their judges ought not to decide, when the universal practice of all nations have and unavoidably must admit of this power. But, say the gentlemen, the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suitor in a court must acknowledge the jurisdiction of the court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy: The government of each state ought to be subordinate to the government of the United States."[189] On Monday, December 10, McKean made an answer to the charge that the Constitution was a consolidation and not a confederation. "To this I answer, the name is immaterial—the thing unites the several states, and makes them like one in particular instances and for particular purposes, which is what is ardently desired by most of the sensible men in this country. I care not whether it is called a consolidation, confederation, or national government, or by what other name, if it is a good government, and calculated to promote the blessings of liberty, tranquillity and happiness."[190]

---

[187] *Id.* at 343.
[188] *Id.* at 350.
[189] *Id.* at 355.
[190] *Id.* at 377.

On Tuesday, December 11, Wilson made his final speech of the convention, during which he gave refutation to the theory which was subsequently advanced up until the time of the Civil War and which is even revived, in abortive fashion, today—namely, that the Constitution is a compact or contract between the states. "We were told some days ago, by the honorable gentleman from Westmoreland (Mr. Findley) when speaking of this system and its objects, that the convention, no doubt, thought they were forming a compact or contract of the greatest importance. Sir, I confess I was much surprised at so late a stage of the debate to hear such principles maintained. It was matter of surprise to see the great leading principle of this system still so very much misunderstood. 'The convention, no doubt, thought they were forming "a contract!" ' I cannot answer for what every member thought; but I believe it cannot be said that they thought they were making a contract, because I cannot discover the least trace of a compact in that system. There can be no compact unless there are more parties than one. It is a new doctrine that one can make a compact with himself. 'The convention were forming compacts!' With whom? I know no bargains were made there. I am unable to conceive who the parties could be. The state governments make a bargain with one another; that is the doctrine that is endeavored to be established, by gentlemen in opposition; their state sovereignties wish to be represented! But far other were the ideas of this convention, and far other are those conveyed in the system itself . . . This, Mr. President, is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, *'We the people do ordain and establish,'* etc., from their ratification, and their ratification alone it is to take its constitutional authenticity; without that it is no more than *tabula rasa.* I know very well all the common-place rant of state sovereignties, and that government is founded in original compact . . . I have already shown that this system is not a compact or contract; the system itself tells you what it is; it is an ordinance and establishment of the people."[191]

Wilson closed his speech with an eloquent evocation of the blessings of nationhood which would flow from the adoption of the Constitution. "I stated on a former occasion one important advantage; by adopting this system we become a NATION; at present we are not one. Can we perform a single national act? Can we do anything to procure us dignity, or to preserve peace and tranquillity? Can we relieve the distress of our citizens? Can we provide for their welfare or happiness? The powers of our government are mere sound . . . This system, Sir, will at least make us a nation, and put it in the power of the Union to act as such. We will be considered as such by every nation of the

[191] *Id.* at 383-85.

world. We will regain the confidence of our own citizens, and command the respect of others. As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government . . . What a happy exchange for the disjointed contentious state sovereignties!"[192]

The next day, Wednesday, December 12, Whitehill for the minority offered fifteen proposed amendments to the Constitution, together with a motion that the convention adjourn so that the people might consider them before the Constitution was ratified. Most of the proposed amendments were in the nature of a bill of personal rights. Reservations of state taxing power, power over elections and over the militia were the subject of separate amendments. Another provided for the supremacy of state constitutions over national treaties and still another redefined and reduced the jurisdiction of the United States courts. The fifteenth and final amendment was "That the sovereignty, freedom and independence of the several States shall be retained, and every power, jurisdiction and right which is not by this constitution expressly delegated to the United States in Congress assembled." This, of course, was Article II of the Articles of Confederation all over again. The majority did not deign to argue against Whitehill. His motion was defeated, 46 to 23, and the Constitution was then approved by precisely the same vote. On December 18, the minority published an address and reasons for dissent, in which they set forth for public consideration the bases of their opposition to the Constitution, one of which was that it would destroy the sovereignty of the states.

Although Pennsylvania had thus ratified, and although each succeeding state convention saw still another approval added, the agitation of the Anti-Federalists in Pennsylvania against the Constitution continued throughout most of the next year, and finally culminated in a convention at Harrisburg in September, 1788. This convention proposed twelve amendments as being desirable of adoption. The first of these proposed amendments read as follows: "That Congress shall not exercise any powers whatsoever, but such as are expressly given to that body by the constitution of the United States; nor shall any authority, power or jurisdiction, be assumed or exercised by the executive or judiciary departments of the union under color or pretense of construction or fiction. But all the rights of sovereignty, which are not by the said constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised, by the several states in union according to their respective constitutions."[193] Others

[192] *Id.* at 414-17.

[193] *Id.* at 562.

would have curtailed Congress's power over taxation, elections, and the militia; and prohibited inferior federal courts.

The Constitution in Connecticut.

In Connecticut, the legislature on October 16 unanimously authorized a convention, which met on January 4, 1788, and which included among its members Oliver Ellsworth, Roger Sherman, and William Samuel Johnson. Only portions of the proceedings have been preserved, but they afford some insight into an understanding of the convention. On January 4 Elsworth, in an opening speech, compared the weakness of the Articles with the strength of the Constitution. "A more energetic system is necessary. The present is merely advisory. It has no coercive power. Without this, government is ineffectual, or rather is no government at all. But it is said, 'Such a power is not necessary. States will not do wrong. They need only be told their duty, and they will do it.' I ask, Sir, what warrant is there for this assertion? Do not states do wrong?" After reviewing the inadequacy of other confederations, Ellsworth continued, "Enough has been said to show that a power in the general government to enforce the decrees of the Union is absolutely necessary. The constitution before us is a complete system of legislative, judicial, and executive power. It was designed to supply the defects of the former system; and I believe, upon a full discussion, it will be found calculated to answer the purposes for which it was designed."[194]

On January 7, Ellsworth defended the principle of national supremacy enforced through legal coercion of individuals. "How contrary, then, to republican principles, how humiliating, is our present situation! A single state can rise up, and put a veto upon the most important public measures. We have seen this actually take place. A single state has controlled the general voice of the Union; a minority, a very small minority, has governed us. So far is this from being consistent with republican principles, that it is, in effect, the worst species of monarchy. Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. No coercion is

---

[194] 2 DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 186-90 (Elliot ed. 1836).

applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent state, it would involve the good and bad, the innocent and guilty, in the same calamity. But this legal coercion singles out the guilty individual, and punishes him for breaking the laws of the union. All men will see the reasonableness of this; they will acquiesce and say, Let the guilty suffer."[195]

The same day Governor Huntington defended the Constitution. "It is an established truth that no nation can exist without a coercive power—a power to enforce the execution of its political regulations . . . The great power of preserving liberty is, to lodge the supreme power so as to be well supported, and not abused . . . I am fully of opinion that the great council of the Union must have a controlling power with respect to national concerns. There is, at present, an extreme want of power in the national government; and it is my opinion that this Constitution does not give too much . . . The state governments, I think, will not be endangered by the powers vested by this Constitution in the general government. While I have attended in Congress, I have observed that the members were quite as strenuous advocates for the rights of their respective states, as for those of the Union. I doubt not but that this will continue to be the case; and hence I infer that the general government will not have the disposition to encroach upon the states."[196]

Also on January 7 Richard Law denied any danger to the states. "Some suppose that the general government, which extends over the whole, will annihilate the state governments. But consider that this general government rests upon the state governments for its support. It is like a vast and magnificent bridge, built upon thirteen strong and stately pillars. Now, the rulers, who occupy the bridge, cannot be so beside themselves as to knock away the pillars which support the whole fabric."[197] And Oliver Wolcott emphasized the political checks on the exercise of national power. "The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general system. The Senate, a constituent branch of the general legislature, without whose assent no public act can be made, are appointed by the states, and will secure the rights of the several states. The other branch of the legislature, the representatives, are to be elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens. So well guarded is this Constitution throughout, that it seems

---

[195] *Id.* at 197.

[196] *Id.* at 198-99.

[197] *Id.* at 201.

impossible that the rights either of the states or of the people should be destroyed."[198]

On January 9, five days after assembling, the Connecticut convention ratified the Constitution, one hundred and twenty-eight to forty-eight. No amendments were proposed.

RATIFICATION IN MASSACHUSETTS

The Massachusetts legislature on October 25, 1787, authorized a convention, which assembled in Boston on January 9, 1788. It was the largest of any of the state conventions, numbering three hundred and sixty-four. There is no doubt that at the outset a majority was opposed to the Constitution. More than any other state perhaps, the Massachusetts convention reflected the differences which for years had separated conservatives from radicals. In general, the commercial interests on the seaboard supported the Constitution, the agricultural elements of the inland opposed it. About twenty of the delegates actually had been participants in Shays' Rebellion. Many of the towns instructed their delegates to vote against ratification. Thus, Harvard in Worcester County so instructed its delegate, on the ground that "the proposed Constitution will, if adopted, effectually destroy the sovereignty of the states, and establish a National Government that, in all probability, will soon bring the good people of the United States under despotism."[199]

Although the anti-Federalists held the initial majority, the Federalists were decidedly superior in their leadership. King, Gorham and Strong, who had been delegates to the Federal Convention, were in attendance, as well as other state leaders: Governor John Hancock, popular with the common people; Theodore Sedgwick, speaker of the house in the state legislature and subsequently Congressman, Senator, and judge of the state supreme court; Theophilus Parsons, a leader of the Massachusetts bar and later chief judge of the state supreme court; Fisher Ames, a rising political light, subsequently to become a brilliant Federalist leader in Congress; and William Heath, revolutionary war general. The anti-Federalist leaders were men who were obscure at the time and are known to history for no reason other than their role in this convention: William Widgery, Samuel Thompson, Samuel Nason, John Taylor, and Phanuel Bishop.

The superior talent of the Federalist leadership was reflected in the high degree of political skill by which they ultimately secured ratification. The choice of Hancock as president of the convention was sug-

---

[198] *Id.* at 202.

[199] HARDING, CONTEST OVER THE RATIFICATION OF THE FEDERAL CONSTITUTION IN THE STATE OF MASSACHUSETTS 56 (1896).

gested and carried by the Federalists who thus hoped to obtain, and did obtain, his influence in support of the Constitution. The Federalists also engineered a meeting of Boston tradesmen and mechanics two days before the convention and secured the adoption of a resolution approving ratification. This was done to influence not only Hancock, but primarily Samuel Adams, the revolutionary hero who, although now past his prime, was still the leader of, and led by, the Boston masses. Adams had expressed his view of the Constitution in a letter to Richard Henry Lee in December, 1787. "I stumble at the threshold," he wrote, "I meet with a national government, instead of a federal union of sovereign states."[200] So successful were the Federalists in neutralizing Adams' private opposition that he never once in the Convention spoke against the Constitution and actually rendered service to their cause. Whereas the Federalists in Pennsylvania, being in the heavy majority, had run roughshod over the opposition, the situation in Massachusetts called for a different tactic. The Anti-Federalists, being of greater strength, were throughout treated with high respect and great tact, while the Federalists sought, through persuasion and political maneuver, to convert their minority to a majority. They even invited Elbridge Gerry, who had been defeated as a delegate, to sit on the floor with the convention and be available for questions.

Being in the minority, the initial tactic of the Federalists was to prevent an early vote on ratification, which they did by moving that the convention consider the Constitution section by section, with this to be followed by debate on the general question of ratification. For almost three weeks, therefore, the convention considered, in desultory fashion, the provisions of the Constitution. The state's traditional devotion to annual elections occasioned some debate over the length of terms of Representatives and Senators. Ames stated that "The senators will represent the sovereignty of the states. The representatives are to represent the people. The offices ought to bear some proportion in point of importance. This will be impossible if they are chosen for one year only."[201] Gore argued in similar fashion: "Further, sir, we must consider this subject with respect to the general structure of the Constitution. The Senate represents the sovereignty of the states; the House of Representatives the people of the United States. The former have a longer term in their office; it is then necessary that that body which represents the people should have a permanence in their office, to resist any operations of the Senate, which might be injurious to the people."[202]

Rufus King distinguished the relative importance of state and

---

[200] *Id.* at 95.

[201] 2 ELLIOT'S DEBATES, *op. cit. supra* note 194, at 11.

[202] *Id.* at 18.

national legislation. "If one year is necessary for a representative to be useful in the state legislature, where the objects of his deliberations are local, and within his constant observation, two years do not appear too long, where the objects of deliberation are not confined to one state, but extend to thirteen states; where the complicated interests of united America are mingled with those of foreign nations; and where the great duties of national sovereignty will require his constant attention . . . as in each of these colonies, when under the British government, the duties of the representatives were merely local, the great duties of sovereignty being vested in their king, so, since the revolution, their duties have continued local, many of the authorities of sovereignty being vested in Congress. It is now proposed to increase the powers of Congress; this will increase the duties of the representatives, and they must have a reasonable time to obtain the information necessary to a right discharge of their office."[203]

Congress's power over elections led to sharp dispute in which the oratorical skill of the Federalists was clearly manifest. Bishop opposed the provision, observing that "by the 4th section, Congress would be enabled to control the elections of representatives. It has been said, says he, that this power was given in order that refractory states may be made to do their duty. But if so, sir, why was it not so mentioned? If that was the intention, he asked why the clause did not run thus: 'The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but,' *if any state shall refuse or* neglect to do so, 'Congress may,' etc. This, he said, would admit of no prevarication . . . if the states shall refuse to do their duty, then let the power be given to Congress to oblige them to do it. But if they do their duty, Congress ought not to have the power to control elections."[204]

Strong followed Bishop to point out the necessity for Section 4. "The power, says he, to regulate the elections of our federal representatives must be lodged somewhere. I know of but two bodies wherein it can be lodged—the legislatures of the several states, and the general Congress. If the legislative bodies of the states, who must be supposed to know at what time, and in what place and manner, the election can best be held, should so appoint them, it cannot be supposed that Congress, by the power granted by this section, will alter them; but if the legislature of a state should refuse to make such regulations, the consequence will be, that the representatives will not be chosen, and the general government will be dissolved. In such case, can gentlemen say that a power to remedy the evil is not necessary to be lodged

---

[203] *Id.* at 19-20.
[204] *Id.* at 23.

somewhere? And where can it be lodged but in Congress?"[205] Bishop was unconvinced, however, saying that "the great difficulty with him was, that the power given by the 4th section was unlimited; and he did not yet see that any advantage would arise from its being so."[206]

Cabot spoke in support of the power. "I confess that I prize the 4th section as highly as any in the Constitution; because I consider the *democratic* branch of the national government, the branch chosen immediately for the people, as intended to be a *check* on the *federal* branch, which latter is not an immediate representation of the people of America, and is not chosen by them, but is a representation of the sovereignty of the individual states, and its members delegated by the several state legislatures; and if the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may, by such an interference, first weaken, and at last destroy, that check; they may at first diminish, and finally annihilate, that control of the general government, which the people ought always to have through their immediate representatives."[207]

Widgery, in opposition, "insisted that we had a right to be jealous of our rulers, who ought never to have a power which they could abuse. The 4th section ought to have gone further; it ought to have had the provision in it mentioned by Mr. Bishop; there would then be a mutual check."[208] White said that "If we give up this section, says he, there is nothing left."[209] Turner stated that "I do not wish to give Congress a power which they can abuse; and I wish to know whether such a power is not contained in this section? I think it is . . . Pardon me, sir, if I say I feel the want of an energetic government, and the dangers to which this dear country is reduced, as much as any citizen of the United States; but I cannot prevail on myself to adopt a government which wears the face of power, without examining it. Relinquishing a *hair's breadth* in a constitution, is a great deal; for by small degrees has liberty, in all nations, been wrested from the hands of the people. I know great powers are necessary to be given to Congress, but I wish they may be well guarded."[210]

In connection with the matter of representation and tenure, the Federalists made answer to the charge of consolidation. Judge Dana, replying to a critic, said "if the Constitution under consideration was in fact what its opposers had often called it, a consolidation of the states, he should readily agree with that gentleman that the representa-

---

[205] *Id.* at 24.
[206] *Id.* at 25.
[207] *Id.* at 26.
[208] *Id.* at 28.
[209] *Ibid.*
[210] *Id.* at 30-32.

tion of the people was much too small; but this was a charge brought against it without any foundation in truth. So far from it, that it must be apparent to every one, that the federal government springs out of, and can alone be brought into existence by, the state governments. Demolish the latter, and there is an end to the former."[211]

Ames replied at greater length. "It is necessary to premise," he said, "that no argument against the new plan has made a deeper impression than this, that it will produce a consolidation of the states. This is an effect which all good men will deprecate. For it is obvious, that if the state powers are to be destroyed, the representation is too small . . . The state governments are essential parts of the system, and the defense of this article is drawn from its tendency to their preservation. The *senators* represent the *sovereignty of the states*; in the other house, individuals are represented."[212] Ames states that Senators "are in the quality of ambassadors of the states, and it will not be denied that some permanency in this office is necessary to a discharge of their duty. Now, if they were chosen yearly, how could they perform their trust? If they would be brought by that means more immediately under the influence of the people, then they will represent the state legislatures less, and become the representatives of individuals. This belongs to the other house. This would totally obliterate the federal features of the Constitution. What would become of the state governments, and on whom would devolve the duty of defending them against the encroachments of the federal government? A consolidation of the states would ensue, which, it is conceded, would subvert the new Constitution, and against which this very article, so much condemned, is our best security. Too much provision cannot be made against a consolidation. The state governments represent the wishes, and feelings, and local interests, of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights."[213]

Article I, Section 8, setting forth the powers of Congress, touched off spirited debate. King was first with a defense of the section. "We now come, sir, to the consideration of the powers with which that government shall be clothed. The introduction to this Constitution is in these words: *'We, the people,'* etc. The language of the Confederation is, *'We, the states,'* etc. The latter is a mere federal government of states. These, therefore, that assemble under it, have no power to make laws to apply to the individuals of the states confederated; and the attempts to make laws for collective societies necessarily leave a discretion to

---

[211] *Id.* at 37.
[212] *Id.* at 45-46.
[213] *Id.* at 46.

comply with them or not. In no instance has there been so frequent deviation from first principles, as in the neglect or refusal to comply with the requisitions of general governments for the collection of moneys . . . Now, sir, what faith is to be put in requisitions on the states? . . . Sir, experience proves, as well as anything can be proved, that no dependence can be placed on such requisitions. What method, then, can be devised to compel the delinquent states to pay their quotas? Sir, I know of none. Laws, to be effective, therefore, must not be laid on states, but upon individuals. Sir, it has been objected to the proposed Constitution, that the power is too great, and by this Constitution is to be sacred. But if the want of power is the *defect in the old Confederation*, there is a fitness and propriety in adopting what is here proposed, which gives the necessary power wanted . . . Sir, I would ask, whether any government can exist, or give security to the people, which is not possessed of this power."[214] Dawes followed with a strong argument that the national power proposed was essential for the protection and development of agriculture, commerce, and manufactures.

Bodman then spoke in opposition. He said "that the power given to Congress to lay and collect duties, taxes, etc., as contained in the section under consideration, was certainly unlimited, and therefore dangerous; and wished to know whether it was necessary to give Congress power to do harm, in order to enable them to do good. It has been said that the *sovereignty of the states* remains with them; but if Congress has the power to lay taxes, and in cases of negligence or non-compliance, can send a power to collect them, he thought that the idea of sovereignty was destroyed."[215]

Judge Sumner, in defense, said that "In order to know whether such powers are necessary, we ought, sir, to inquire what the design of uniting under one government is. It is that the national dignity may be supported, its safety preserved, and necessary debts paid. Is it not necessary, then, to afford the means by which alone those objects can be attained? . . . But some gentlemen object further, and say the delegation of these great powers *will destroy the state legislatures*; but I trust this never can take place, for the general government depends on the state legislatures for its very existence. The President is to be chosen by electors under the regulation of the state legislature; the Senate is to be chosen by the state legislatures; and the representative body by the people, under like regulations of the legislative body in the different states . . . nothing is clearer than that the existence of the legislatures, in the different states, is essential to the *very being* of the general government."[216] Phillips also stated that "On this article is founded

[214] *Id.* at 55-57.
[215] *Id.* at 60.
[216] *Id.* at 63-64.

the main pillar of the building; take away this pillar, and where is your government? Therefore, I conceive, in this view of the case, this power is absolutely necessary."[217]

Symmes then took up the attack, demanding to know "why an unlimited power in the affair of taxation is so soon required . . . Here, sir, (however kindly Congress may be pleased to deal with us) is a very good and valid conveyance of all the property in the United States—to certain uses indeed, but those uses capable of any construction the trustees may think proper to make . . . The paragraph in question is an absolute decree of the people. The Congress *shall* have power. It does not say that they shall *exercise* it; but our necessities say they *must*, and the experience of ages say that they *will* . . . It is a universal, unbounded permission, and as such, I think, no free people ought ever to consent to it, especially in so important a matter as that of property . . . Sir, I also disapprove of the power to collect, which is here vested in Congress. It is a power, sir, to burden us with a standing army of ravenous collectors. . . ."[218] Then calling attention to the qualifying clause "to pay the debts and provide for the common defense and general welfare," he said "These words, sir, I confess, are an ornament to the page, and very musical words; but they are too general to be understood as any kind of limitation on the power of Congress, and not very easy to be understood at all. When Congress have the purse, they are not confined to rigid economy; and the word *debts* here is not confined to debts already contracted; or, indeed, if it were, the term 'general welfare' might be applied to any expenditure whatever . . . This clause, sir, contains the very sinews of the Constitution. And I hope that the universality of it may be singular, but it may easily be seen, that it tends to produce, in time, as universal powers in every other respect."[219]

Thompson, speaking again in opposition, stated: "Sir, the question is, whether Congress shall have power. Some say that, if this section was left out, the whole would fall to the ground. I think so too, as it is all of a piece. We are now fixing a national consolidation. This section, I look upon it, is big with mischiefs . . . Gentlemen say this section is clear as the sun, and that all power is retained which is not given. But where is the bill of rights which shall check the power of this Congress; which shall say, *Thus far shall ye come, and no farther.* The safety of the people depends on a bill of rights. If we build on a sandy foundation, is it likely we shall stand? I apply to the feeling of the Convention. There are some parts of this Constitution which I cannot digest; and, sir, shall we swallow a large bone for the sake of a

---

[217] *Ibid.*

[218] *Id.* at 70-73.

[219] *Id.* at 74.

little meat? Some say, Swallow the whole now, and pick out the bone afterwards. But I say, Let us pick off the meat, and throw the bone away . . . if this Constitution is got down, we shall alter the system entirely and have no checks upon Congress."[220]

Bowdoin defended the section without equivocation. "There have been many objections offered against the Constitution; and of these the one most strongly urged has been, the great power vested in Congress . . . the investiture of such power, so far from being an objection, is a most cogent reason for accepting the Constitution . . . If we consider the objects of the power, they are numerous and important; and as human foresight cannot extend to many of them, and all of them are in the womb of futurity, the quantum of the power *cannot* be estimated . . . as it must be applied to a vast variety of objects, and to cases and exigencies beyond the ken of human prescience, [the power] must be very great; and which *cannot* be limited without endangering the public safety . . . A possibility of abuse, as it may be affirmed of any delegated power whatever, is by itself no sufficient reason for withholding the delegation. If it were a sufficient one, no power could be delegated; nor could government of any sort subsist."[221]

He was supported by Parsons, who said that the Constitution would create "a government to be administered for the common good by the servants of the people, vested with delegated powers by popular elections at stated periods . . . in this case the people divest themselves of nothing; the government and powers which the Congress can administer, are the mere result of a compact made by the people with each other, for the common defense and general welfare. . . ."[222]

Continuing his discourse, Parsons discussed the checks against any usurpation of power by the national government. "But there is another check, founded in the nature of the Union, superior to all the parchment checks that can be invented. If there should be a usurpation, it will not be on the farmer and merchant, employed and attentive only to their several occupations; it will be upon thirteen legislatures, completely organized, possessed of the confidence of the people, and having the means, as well as inclination, successfuly to oppose it. Under these circumstances, none but madmen would attempt a usurpation. But, sir, the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his own fellow-citizens can convict him; they are his jury, and if they pronounce him innocent,

---

[220] *Id.* at 79-81.
[221] *Id.* at 84-85.
[222] *Id.* at 89-91.

not all the powers of Congress can hurt him; and innocent they will certainly pronounce him, if the supposed law he resisted was an act of usurpation."[223]

At this point the anti-Federalists, evidently perceiving that the Federalists were getting much the better of the debate, sought to hasten action lest they lose their majority. Nason therefore moved to reconsider the former vote to discuss the Constitution by paragraphs, and to discuss the subject at large. This motion "met with a warm opposition." Adams aided the Federalist cause by speaking against it, and it was defeated.

The discussion was resumed. Dench said "it had been observed, and he was not convinced that the observation was wrong, that the grant of the powers in this section would produce a consolidation of the states, and the moment it begins, a dissolution of the state governments commences . . . from the words, 'we, the people,' in the first clause, ordaining this Constitution, he thought it was an actual consolidation of the states. . . ."[224] Brooks, in answer, said that Dench's idea was "ill founded—or rather a loose idea. In the first place, says he, the Congress, under this Constitution, cannot be organized without repeated acts of the legislatures of the several states; and, therefore, if the creating power is dissolved, the body to be created cannot exist. In the second place, says the general, it is impossible the general government can exist, unless the governments of the several states are forever existing . . . It was, therefore, he said, impossible that the state governments should be annihilated by the general government . . . and concluded by observing, that, as the United States guaranty to *each state* a republican form of government, the state governments were as effectually secured as though this Constitution should never be in force."[225]

Singletary, however, "thought we were giving up all power, and that the states will be like towns in this state." Going back to the days of 1775, he said that "if any body had proposed such a constitution as this in that day, it would have been thrown away at once. It would not have been looked at. We contended with Great Britain, some said for a threepenny duty on tea; but it was not that; it was because they claimed a right to tax us and bind us in all cases whatever. And does not this Constitution do the same? Does it not take away all we have—all our property? Does it not lay all taxes, duties, imposts, and excises? And what more have we to give? . . . These lawyers and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this

---

[223] *Id.* at 94.
[224] *Id.* at 98-99.
[225] *Id.* at 99-100.

Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great *Leviathan*, Mr. President; yes, just as the whale swallowed up Jonah. This is what I am afraid of; but I won't say any more at present. . . ."[226]

Then a delegate named Smith took the floor and delivered what has come to be one of the better known defenses of the Constitution given in any of the state conventions. "Mr. President," he said, "I am a plain man, and get my living by the plough. I am not used to speak in public, but I beg your leave to say a few words to my brother ploughjoggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it." Then he described, in words eloquent for their simplicity, the anarchy and the excesses of Shays' Rebellion. "Now, Mr. President, when I saw this Constitution, I found that it was a cure for these disorders. It was just such a thing as we wanted. I got a copy of it, and read it over and over. I had been a member of the Convention to form our own state constitution, and had learnt something of the checks and balances of power, and I found them all here. I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution. My honorable old daddy there [pointing to Mr. Singletary] won't think that I expect to be a Congressman, and swallow up the liberties of the people. I never had any post, nor do I want one. But I don't think the worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it. I don't suspect that they want to get into Congress and abuse their power. . . . There is a time to sow and a time to reap; we sowed our seed when we sent men to the federal Convenvention; now is the harvest, now is the time to reap the fruit of our labor; and if we won't do it now, I am afraid we shall never have another opportunity."[227]

Discussion then continued on the remainder of the Constitution. It is not reported at length and is not very revealing. The recorders stated that "We do not think it essential to go into a minute detail of the conversation; as, in the speeches on the grand question, the field is again gone over. We can only say that, with the utmost attention, every objection, however trifling, was answered, and that the unremitted endeavors of gentlemen who advocated the Constitution to convince those who were in error, were not without effect."[228]

The convention had now been in session for about three weeks, and although the Federalists had gained support, it seemed certain that the Constitution could not be ratified without some apparent concession

---

[226] *Id.* at 100-01.

[227] *Id.* at 102-04.

[228] *Id.* at 109.

to its opponents. Federalist political skill was equal to the occasion; the opposition would be mollified by bringing forward amendments covering the most serious objections. These amendments would be approved as recommendations to Congress, to be introduced and urged by the Massachusetts delegation; ratification, however, would not be conditional upon their eventual adoption into the Constitution. The true finesse of the Federalists is demonstrated by their persuasion of Hancock to introduce the amendments as president of the convention, and to support ratification on that basis. This they accomplished by promising Bowdoin's withdrawal as a rival to Hancock's re-election as governor, and also by dangling before him the prospect of the Presidency or Vice-presidency of the new government. Although president of the convention, Hancock had not appeared on the floor, the reason given being the gout, which King said would be cured "as soon as the majority is exhibited on either side."[229] So the maneuver was executed. Hancock took his seat on January 30. On January 31 Parsons moved that the convention "do assent to, and ratify, this Constitution." Heath then made a preparatory statement suggesting what was to come. In the afternoon, Hancock took the floor and played his role, introducing the series of amendments and managing to convey the impression, without actually saying so, that this was his own idea and that they were his handiwork. They had in fact been prepared by King, Parsons and Sedgwick. Hancock's proposal met with the approbation of Adams, who sought to convey the idea, again without actually saying so, that ratification should be conditional upon the adoption of the amendments in Congress and by the states. The amendments were referred to a committee, and discussion meanwhile continued.

Perceiving that the Federalist strategy was undermining their strength, the more avid of the anti-Federalists now were forced to oppose the amendments, the necessity of which they had been urging. They sought to remove the anomaly of their position by pleading lack of power. Taylor said he "liked the idea of amendments; but, he said, he did not see any constitutional door open for the introduction of them by the Convention. He read the several authorities which provided for the meeting of conventions, but did not see in any of them any power given to propose amendments. We are, he said, therefore treading on unsafe ground to propose them; we must take the whole, or reject the whole."[230] Widgery stated that "he did not see the probability that these amendments would be made, if we had authority to propose them. He considered, he said, that the convention did not meet for the purpose of recommending amendments, but to adopt or reject the Consti-

---

229HARDING, *op. cit. supra* note 199, at 85.

2302 ELLIOT'S DEBATES, *op. cit. supra* note 194, at 125.

tution."[231] And Thompson declared that "we have no right to make amendments. It was not, he said, the business we were sent for. He was glad, he said, that gentlemen were now convinced it was not a perfect system, and that it wanted amendments. This, he said, was different from the language they had formerly held. However, as to the amendments, he could not say amen to them, but they might be voted for by some men—he did not say Judases."[232]

Others were more intransigent. Nason took the position that, even with the amendments, he was still opposed to the Constitution because it destroyed the sovereignty of the states. "When sir, we dissolved the political bands which connected us with Great Britain, we were in a state of nature. We then formed and adopted the Confederation, which must be considered as a sacred instrument. This confederates us under one head, as sovereign and independent states. Now, sir, if we give Congress power to dissolve the Confederation, to what can we trust? If a nation consent thus to treat their most solemn compacts, who will ever trust them? Let us, sir, begin with this Constitution, and see what it is. And first, 'We, the people of the United States, do,' etc. If this, sir, does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does. What! shall we consent to this? Can ten, twenty, or a hundred persons in this state, who have taken the oath of allegiance to it, dispense with this oath? Gentlemen may talk as they please of dispensing, in certain cases, with oaths; but sir, with me they are sacred things. We are under oath; we have sworn that Massachusetts is a sovereign and independent state. How, then, can we vote for this Constitution, that destroys that sovereignty?"[233]

The success of the Federalist strategy in winning votes for ratification cannot be doubted. Barrell said that he feared the Constitution was "pregnant with baneful effects, although I may not live to feel them," and that under it "Congress will be vested with more extensive powers than ever Great Britain exercised over us . . . ." He said some, but not all, of his objections "have been removed, in the course of the debates, by the ingenious reasonings of the speakers." He said that "although you may perceive, by what I have said, that this is not, in my view, the most perfect system I could wish," yet he was "possessed with an assurance that the proposed amendments will take place. . . I dread the fatal effects of anarchy. . . I am convinced the Confederation is essentially deficient, and that it will be more difficult to amend that than to reform this. . . . I think this Constitution, with all its imperfections, is excellent, compared with that, and that this is the best con-

---

[231] *Id.* at 138.
[232] *Id.* at 140.
[233] *Id.* at 134.

stitution we can now obtain. . . ." He said he would have preferred an adjournment to enable him to consult with his constituents, "But, sir, if I cannot be indulged on this desirable object, I am almost tempted to risk their displeasure, and adopt it without their consent."[234]

Turner said that "I have been averse to the reception of this Constitution, while it was considered merely in its original form; but since the honorable convention have pleased to agree to the recommendation of certain amendments, I acknowledge my mind is reconciled."[235] And Symmes, who had previously spoken again the Constitution, now stated: "Upon the whole, Mr. President, approving the amendments, and firmly believing that they will be adopted, I recall my former opposition, such as it was, to this Constitution, and shall—especially as the amendments are a standing instruction to our delegates until they are obtained—give it my unreserved assent."[236]

The Federalists steadily pressed their case, reiterating their belief in the intrinsic merit of the Constitution, and expressing their willingness to ratify even without amendments. They also took pains to make it clear that there was no intention that ratification should be conditional upon the eventual incorporation of the amendments into the Constitution. Dalton stated: ". . . Sir, that gentleman may not again say, as has been the case this day, that the gentlemen who advocate the measure of the proposition were now convinced that amendments to the Constitution were indispensable, I, sir, in my place, say, that I am willing to accept this Constitution as it is; and I am in favor of the motion of proposing amendments, only as it is of a conciliating nature, and not as a concession that amendments are necessary."[237] Jarvis said that if the amendments "were made conditional to our receiving the proposed Constitution, it has appeared to me that a conditional amendment must operate as a total rejection. . . . It has been insinuated, sir, that these amendments have been artfully introduced to lead to a decision which would not otherwise be had. . . . The propositions are annexed, it is true, to the ratification; but the assent is complete and absolute without them. It is not possible that it can be understood otherwise by a single member of this honorable body."[238]

And Ames asserted that "The only question which seems to labor is this: the amendments are not a part of the Constitution, and there is nothing better than a probability to trust to, that they will ever be adopted. . . . Very few among us now deny that a federal government is necessary to save us from ruin; that the Confederation is not that

---

[234] *Id.* at 159-61.
[235] *Id.* at 170.
[236] *Id.* at 174.
[237] *Id.* at 141.
[238] *Id.* at 152-53.

government; and that the proposed Constitution, connected with the Amendments, is worthy of being adopted. The question recurs, Will the amendments prevail, and become part of the system? In order to obtain such a system as the Constitution and the amendments, there are but three ways of proceeding—to reject the whole, and begin anew; to adopt this plan upon condition that the amendments be inserted into it; or to adopt his excellency's proposition."[239] He concluded with a peroration that rang with metaphors. "The Union is essential to our being as a nation. The pillars that prop it are crumbling to powder. The Union is the vital sap that nourishes the tree. . . . If we reject the Constitution . . . we girdle the tree, its leaves will wither, its branches drop off, and the mouldering trunk will be torn down by the tempest. . . . We approve our own form of state government, and seem to think ourselves in safety under its protection. We talk as if there was no danger in deciding wrong. But when the inundation comes, shall we stand on dry land? The state government is a beautiful structure. It is situated, however, upon the naked beach. The Union is the dike to fence out the flood."[240]

On February 5 the opposition realized that the strategy of the Federalists was likely to result in an unconditional ratification. Desperate, they sought to stave off defeat by moving to adjourn the convention to a future day. But it was too late. The motion was defeated. The next day Reverend Stillman concluded the arguments. Contrasting the national with the state governments, he said that "in the former, the objects of government will be great, numerous, and extensive; in the latter, comparatively small and limited." Recognizing that the powers of Congress were "great and extensive," he asked: "Who are Congress, then? They are ourselves; the men of our own choice, in whom we can confide; whose interest is inseparably connected with our own. Why is it, then, that gentlemen speak of Congress as some foreign body, as a set of men who will seek every opportunity to enslave us? Such insinuations are repugnant to the spirit of the Constitution." He concluded: "Viewing the Constitution in this light, I stand ready to give my vote for it, without any amendments at all. Yet, if the amendments proposed by your excellency will tend to conciliation, I readily admit them, not as a condition of acceptance, but as a matter of recommendation only; knowing that blessed are the peacemakers. I am ready, sir, to submit my life, my liberty, my property, and, as far as my vote will go, the interest of my constituents, to this general government."[241]

Hancock then arose and addressed the convention. He said: "That a general system of government is indispensably necessary to save

---

[239] *Id.* at 154-56.
[240] *Id.* at 158-59.
[241] *Id.* at 165-69.

our country from ruin, is agreed upon sides . . . I give my assent to the Constitution, in full confidence that the amendments proposed will soon become a part of the system."[242] The ratification resolution revealed the nature of the compact and the ratifying authority. "The Convention, having impartially discussed and fully considered the Constitution for the United States of America . . . and acknowledging with grateful hearts the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other . . . DO, in the name and in behalf of the people of the commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America."[243] The resolution also made clear that the amendments were merely recommendations. "And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fear and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution. . . ."[244] The state's representatives in Congress were enjoined, "agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions. . . ."[245]

The vote was close—187 to 168. A change of ten votes would have defeated ratification. But the Federalists had won. And the beaten opponents accepted the result without bitterness or rancor.

And what were the recommended amendments which paved the way for ratification? There were nine of them, and three are relevant to the subject of this study. The very first one was an echo from Article II of the Confederation. It was "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised." The third was that Congress should not exercise its power over elections under Article I, Section 4, "but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress . . . ." The fourth was that Congress should not lay direct taxes, "but when the moneys arising from the impost and excise are insufficient for the public exigencies," and not even then, until Congress

---

[242] *Id.* at 175.
[243] *Id.* at 176.
[244] *Id.* at 177.
[245] *Id.* at 178.

had first tried to raise the money through state requisitions. These were the amendments which would have cured what to the opponents of the Constitution were its major defects. The fact that they were recommended as additions to the Constitution is a measure of what the Constitution, without such amendments, meant both to its supporters and its opponents.

Ratification in Massachusetts was of pivotal importance to its ultimate acceptance. For one thing, the result in Massachusetts was being anxiously awaited in those states whose conventions had not yet met or acted. The New York legislature, in fact, had not yet decided to call a convention. Because of the high rank which Massachusetts held among the states, a rejection by her convention of the Constitution might well have been fatal to its adoption. Secondly, there was the fact that the Constitution was still in very real danger so long as the issue before the remaining conventions was the choice between bare acceptance and rejection. The technique evolved in Massachusetts of offering recommended amendments had shown the way whereby the Federalists could undermine opposition and achieve unconditional ratification of the Constitution as it came out of the Convention. In a letter to Randolph in April, 1788, Madison wrote: "A conditional ratification or a second convention appears to me utterly irreconcilable with the dictates of prudence and safety. Recommendatory alterations are the only ground for a coalition among the real federalists."[246] Before Massachusetts, not one of the ratifying conventions had recommended amendments; after Massachusetss, all the remaining conventions except Maryland did so.

RATIFICATION IN MARYLAND, SOUTH CAROLINA AND NEW HAMPSHIRE

Although six state conventions had ratified, the result was still not free from doubt. The New Hampshire convention had adjourned without taking any action, thereby encouraging the opposition in South Carolina and Virginia, which were soon to decide. Because of the proximity between the two states, it was recognized that the action taken by Maryland would have a great effect on Virginia, and both Virginia Federalists—notably Washington and Madison—and anti-Federalists—Richard Henry Lee and Patrick Henry—exerted their influence in Maryland. By tradition, the state was national-minded. She had been the last to ratify the Articles, holding out until the wealth of the Western lands should be devoted to the entire union. She had consistently supported the efforts to augment Congress's powers under the Articles,

[246] BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274 (5th ed. 1885).

and the call for the Philadelphia Convention had gone forth from Annapolis. Sentiment was heavily in favor of the Constitution.

The state's delegation to the Federal Convention was asked to appear before the legislature in November, 1787, but only Luther Martin's report has been preserved. Published as his "Genuine Information," it has been discussed above. The legislature authorized a convention to meet the following April. In the interim debate and discussion took place throughout the state and in the newspapers. The ablest Federalist tract published during this period was Alexander Contee Hanson's "Remarks on the Proposed Plan of a Federal Government." The candidates for delegates to the convention ran on the basis of their support or opposition to the Constitution, and when the convention of 76 members assembled at Annapolis on Monday, April 21, there were only twelve opponents of ratification present. The most prominent of the Federalists were Hanson and McHenry; the anti-Federalist leaders were Martin, Mercer, and Samuel Chase.

Before the convention assembled, the Federalists in caucus had agreed that ample time and opportunity had been afforded for discussion of the merits and demerits of the Constitution, that the main question had already been decided in the county elections of delegates, and that the convention's purpose therefore was merely to formally register the people's choice. Confident of their strength, their strategy thus was to expedite matters as much as possible, to ratify quickly and decisively, and adjourn, this being calculated to give the maximum encouragement to the remaining conventions. On Wednesday, therefore, the convention resolved not to discuss the particular parts of the Constitution, but to read it twice, "after which the subject may be fully debated and considered," and then the question of ratification should be put. The Federalists speeded matters up further by refusing to engage in the debate.

On Thursday afternoon William Paca arrived late and after taking his seat announced that he wished to offer amendments, saying that "although he did not expect amendments to be made the condition of ratification, he wished them to accompany it, as standing instructions to our representatives in Congress."[247] Having just arrived, he asked the convention's indulgence until the next day. The convention did not expressly agree to receive the amendments, but it did then adjourn. The next morning, much to Paca's surprise and indignation, numerous Federalists objected to the introduction of the amendments, on the ground "that they were elected and instructed, by the people they represented, to ratify the proposed Constitution, and that as speedily as possible, and to do no other act."[248] The result was that Paca was not

[247]Steiner, *Maryland's Adoption of the Federal Constitution*, 5 AM. HIST. REV. 210 (1900).

[248]2 ELLIOT'S DEBATES, *op. cit. supra* note 194, at 548.

even permitted to read his amendments. Discussion was then resumed in one-sided fashion. The Anti-federalists continued to make their objections, which were steadfastly ignored by the Federalists. The records state that "The advocates of the government, although repeatedly called on, and earnestly requested, to answer the objections, if not just, remained inflexibly silent."[249] The discussion itself has not been preserved. Finally, on Saturday afternoon, April 26, the Federalists called for the question, and the Constitution was ratified by a vote of 63 to 11. The ratification was "in the name and on the behalf of the people of this state."

Paca then again asked permission to lay his amendments before the convention. He said that without them his constituents would "firmly oppose" the Constitution, "he believed even with arms."[250] The Federalists were now willing to mollify the opposition. Although they "did not deem the proposed amendments necessary to perfect the Constitution,"[251] they did agree to the appointment of a committee to consider the amendments. Generously they gave the opposition four of the thirteen members of the committee, and resolved that they would consider no amendments except those which might be reported to them by the committee. Working over the weekend, the committee agreed on thirteen amendments, but rejected fifteen others. The first of the amendments agreed to was "That Congress shall exercise no power but what is expressly delegated by this Constitution." The purpose was explained by Paca as follows: "By this amendment, the general powers given to Congress by the first and last paragraphs of the 8th section of Article I, and the 2nd paragraph of the 6th Article, would be in a great measure restrained; those dangerous expressions, by which the bills of rights, and constitutions, of the several states, may be repealed by the laws of Congress, in some degree moderated; and the exercise of constructive powers wholly prevented."[252] The provisions referred to, of course, were the taxing power, the necessary and proper clause, and the supremacy clause.

Included in the amendments which were rejected by a majority of the Committee were the following: that Congress should have no power over elections unless a state should neglect to make or execute the necessary regulations; that the collection of any direct tax imposed by Congress should be suspended until the states should have an opportunity to pay the sums involved; that no treaty should be effectual to repeal or abrogate any part of any state constitution or bill of rights; that Congress could exercise its power to regulate commerce only by two-thirds vote.

---

[249] *Ibid.*

[250] Steiner, *supra* note 247, at 212.

[251] *Ibid.*

[252] 2 ELLIOT'S DEBATES, *op. cit. supra* note 194, at 550.

The majority of the committee was willing to report to the convention only the thirteen proposed amendments which had been approved by the majority. The minority insisted that the first three of the rejected amendments also be included. The result was that the committee made no report at all to the convention. Paca presented the minority's views, and after hearing him courteously, the convention, by vote of 47 to 27, adjourned without taking any action on the amendments. On May 6 Paca and the minority published their address to the people, setting forth the above events. A reply by the majority was prepared by Hanson, but was never published.

In South Carolina, the principal recorded opposition to the Constitution took place in the legislature which was considering the call of a convention. On January 16, 1788, Charles Pinckney summarized for the legislature the origin and development of the new scheme of government and described its principal defects. He said that the Confederation had been "nothing more than a federal union; or, strictly speaking, a league founded in paternal and persuasive principles, with nothing permanent and coercive in its construction, where the members might, or might not, comply with their federal engagements, as they thought proper . . . It was sufficient to remark that the Convention saw and felt the necessity of establishing a government upon different principles, which, instead of requiring the intervention of thirteen different legislatures between the demand and the compliance, should operate upon the people in the first instance." He minimized the likelihood that the new government would be too vigorous in its operation. "In a Union extensive as this is, composed of so many state governments, and inhabited by a people characterized, as our citizens are, by an impatience under any act which even looks like an infringement of their rights, an invasion of them by the federal head appeared to him the most remote of all our public dangers. So far from supposing a change of this sort at all probable, he confessed his apprehensions were of a different kind: he rather feared that it was impossible, while the state systems continue—and continue they must—to construct any government upon republican principles sufficiently energetic to extend its influence through all its parts." He also thought, in this same connection, that "it will be impossible so far to divest the majority of the federal representatives of their state views and policy, as to induce them always to act upon truly national principles."[253]

Pinckney's remarks on the national judiciary were striking. "It was," he declared, "at once the most important and intricate part of the system. That a supreme federal jurisdiction was indispensable, cannot be denied. It is equally true that, in order to insure the admin-

[253] 4 *id.* 255-60.

istration of justice, it was necessary to give it all the powers, original as well as appellate, the Constitution has enumerated . . . from the extensiveness of its powers, it may be easily seen that, under a wise management, this department might be made the keystone of the arch, the means of connecting and binding the whole together, of preserving uniformity in all the judicial proceedings of the Union . . . [its duty] would be not only to decide all national questions which should arise within the Union, but to control and keep the state judicials within their proper limits whenever they shall attempt to interfere with its power."[254]

Opposition to the Constitution was expressed by Rawlins Lowndes. Reading the supremacy clause, he asked: "Now in the history of the known world, was there an instance of the rulers of a republic being allowed to go so far?" He criticized the commerce power in this fashion: "Congress [of the Confederation] laboring under many difficulties, asked to regulate commerce for twenty-one years, when the power reverted into the hands of those who originally gave it; but this infallible new Constitution eased us of any more trouble, for it was to regulate commerce *ad infinitum*; and thus called upon us to pledge ourselves and posterity, forever, in support of their measures . . . ." He defended the Articles and the men who had written them, saying that "their prudence and wisdom particularly appeared in the care which they had taken sacredly to guarantee the sovereignty of each state. The treaty of peace expressly agreed to acknowledge us as free, sovereign, and independent states, which privileges we lived at present in the exercise of. But this new Constitution at once swept those privileges away, being sovereign over all; so that this state would dwindle into a mere skeleton of what it was; its legislative powers would be pared down to little more than those now vested in the corporation; and he should value the honor of a seat in the legislature in no higher estimation than a seat in the city council." He stated that "It has been said that this new government was to be considered as an experiment . . . So far from having any expectation of success from such experiments, he sincerely believed that, when this new Constitution should be adopted, the sun of the Southern States would set, never to rise again."[255]

Lowndes was answered by Charles Cotesworth Pinckney. Referring to the Declaration of Independence, Pinckney stated: "This admirable manifesto, which, for importance of matter and elegance of composition, stands unrivalled, sufficiently confutes the honorable gentlemen's doctrine of the individual sovereignty and independence of the several states. In that Declaration the several states are not even enumerated . . . The separate independence and individual sovereignty of the several

[254] *Id.* at 257-58.

[255] *Id.* at 273, 287, 271.

states were never thought of by the enlightened band of patriots who framed the Declaration; the several states are not even mentioned by name in any part of it,—as if it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent. Let us, then, consider all attempts to weaken this Union, by maintaining that each state is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on the most serious distresses."[256] Defending the system of representation, he said: ". . . the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the state legislatures, and represent the states in their political capacity; and thus each branch will form a proper and independent check on the other, and the legislative powers will be advantageously balanced."[257]

Lowndes then "thanked those gentlemen on the other side of the question for the candid, fair manner in which they had answered his arguments. Popularity was what he never courted; but on this point he spoke merely to point out those dangers to which his fellow-citizens were exposed—dangers which were so evident that, when he ceased to exist, he wished for no other epitaph, than to have inscribed on his tomb, 'Here lies the man that opposed the Constitution, because it was ruinous to the liberty of America.' "[258]

The legislature then unanimously authorized a convention which should meet on May 12. By a single vote, Charleston was chosen over Columbia as the place of meeting. The convention which assembled in response to this call numbered two hundred and thirty-six. It included the two Pinckneys and John Rutledge of the state's delegation to the Federal Convention; Thomas Pinckney, the governor; Christopher Gadsden, the state's most venerable statesman; and David Ramsey, the historian whose tract in support of the Constitution has been discussed above. The leading Anti-Federalists were General Sumter and Edanum Burke. Unfortunately, only fragments of the debates have been preserved. On May 21, the Anti-Federalists sought to adjourn the convention until October 20, but the motion was defeated, 135 to 89. On May 23, the Constitution was ratified by a comfortable two-to-one majority, 149 to 73.

The convention then, as a concession to the minority, resolved in favor of four amendments which the state's delegates in the new Congress should seek to effectuate. The first of these was that the control over elections "should be forever inseparably annexed to the sovereignty

---

[256] *Id.* at 301-02.

[257] *Id.* at 304.

[258] *Id.* at 311.

of the several states," and that Congress should have no power over elections "except in cases where the legislatures of the states shall refuse or neglect to perform and fulfill the same according to the tenor of the said Constitution." The second was "that no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union." The third was that Congress should lay no direct taxes except where duties and imposts proved to be insufficient and not even then until Congress should first have made requisitions on the states.[259]

The steady march toward ratification had achieved its first check in New Hampshire. The convention of one hundred and thirteen delegates assembled at Exeter on February 13, 1788. A heavy majority was opposed to the Constitution and many delegates were under instructions from their towns to vote against it. As usual, however, superior ability and political skill were on the side of the Federalists, in the person of John Langdon, delegate to the Federal Convention; John Sullivan, the governor; Samuel Livermore, chief justice of the superior court; and John Taylor Gilman, member of the old Congress and later governor four times. The opposition was led by Joshua Atherton, Charles Barrett, Abel Parker, William Hooper, and Matthias Stone. Adapting their strategy to the circumstances, the Federalists sought to postpone a vote until such time as they could win. The debate proceeded for about a week; unfortunately none has been preserved. During this period the persuasive oratorical skill of the Federalists made many converts to their cause, but it was still apparent that if a vote were taken, the Constitution would be defeated. They therefore moved to recess the Convention until June 18, when it should reconvene at Concord. Langdon's motion was opposed by Atherton, but carried by the narrow margin of 56 to 51.

With outright defeat thus averted, the Federalists diligently used the interim period to educate the people and to change local instructions to the delegates. When the convention reassembled, they were in a much stronger position. During the recess Maryland and South Carolina had ratified, bringing the total of ratifications to eight. The Virginia convention had been in session since June 2, and the New York convention had assembled on June 17. This status of affairs enabled the Federalists to argue that, by quick action, New Hampshire could achieve the distinction of being the ninth convention to ratify, thus putting the Constitution into operation. They followed up this appeal on June 20 with a motion by Langdon, following the example set in Massachusetts, offering a series of recommended amendments to

[259]DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1023 (Tansill ed. 1927).

accompany the ratification. The amendments, in fact, were virtually identical with those proposed in Massachusetts, and therefore will not be repeated here.

Atherton for the opposition sought to frustrate this strategy by moving that the Constitution be ratified but that it should not be operative in New Hampshire until the amendments should be incorporated. This, of course, was equivalent to a rejection of the Constitution as it stood. Livermore for the Federalists countered by moving that the Atherton motion be postponed to make way for a substitute motion that in case the Constitution should be ratified, the amendments should be recommended to Congress. This motion carried by a small majority. It was now clear that the Constitution would be ratified. Now it was the anti-Federalists who sought to postpone the vote. Atherton moved that the convention adjourn to some future day, but it failed to carry. Then Livermore, seconded by Langdon, moved that the main question be put. By a vote of 57 to 47, the convention ratified the Constitution. Once again Federalist political ability had turned defeat into victory. The vote was taken at one o'clock on Saturday, June 20, and not knowing whether the Virginia convention had yet acted, the New Hampshire convention protected its claim to the honor of being the ninth state convention to ratify by recording the hour as well as the day of the vote.

[Editor's Note: This article will be continued in the May 1962 issue of the *Mississippi Law Journal*.]

APPLICATION OF THE DOCTRINE OF SHELLEY v. KRAEMER TO THE DETERMINABLE FEE

*Joe O. Sams, Jr.**

I. Statement of Problem

When any decision establishes a principle or doctrine and this doctrine has been created solely because of the nature of the interest in property, then any subsequent application of the doctrine must be dependent upon a substantial *identity of interests*[1] as contrasted with relative *similarity of purposes*[2] between the case first announcing the doctrine and the case under consideration. This article will set forth the case first promulgating the doctrine under consideration;[3] the nature and operation of the interest therein; and a delineation of some non-identical interests which have relatively similar purposes. Accordingly, the cases subsequent to the case announcing the doctrine will be subjected to an analysis with the view of determining the interest therein; its identity relation to the principal case as regards the interest and the purpose, and the application of the doctrine found in the principal case to the interest in the particular case.

II. Origin of Doctrine

The decision in *Shelley v. Kraemer* and the decisions in those cases considered at the same time[4] and immediately thereafter[5] generally have been considered landmark cases in the law of this country if for no other reason than the theory adopted by the court that judicial action in enforcing a covenant by injunction is state action[6] within the mean-

*Sams & Sams, Columbus, Mississippi.

[1]This phrase is used by this writer to denote interests which have a corresponding operation before the holder of the interest can effect the rights secured in the interest. In this article it will refer primarily to those interests which may create only a basis for judicial action before they can become effective and those interests which render the prior estate to some extent defeasible.

[2]The purpose referred to in this article is that which serves as the objective for the creation of the interest, *i.e.*, limited as to use or ownership to those of a certain race.

[3]See Shelley v. Kraemer, 343 U.S. 1 (1948).

[4]McGee v. Sipes, 334 U.S. 1 (1948).

[5]Hurd v. Hodge, 334 U.S. 24 (1948).

[6]On page 19 of the Shelley case the court pointed out that "judicial action is not immunized from the operation of the fourteenth amendment simply because it is taken pursuant to the state's common law policy." The court further quoted from the case of Twining v. New Jersey, 211 U.S. 78 (1908), as follows, "the judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state."

ing of the fourteenth amendment to the United States Constitution.

On February 16, 1911, thirty out of thirty-nine property owners of real estate fronting on Labadie Avenue in St. Louis signed an agreement consisting in part of the following:

> The said property is hereby restricted to the use and occupancy for the term of fifty (50) years from this date, so that it shall be a condition all the time . . . that hereafter no part of said property or any portion shall be occupied by any person not of the caucasian race.[7]

Petitioner Shelley bought the property in question, receiving a warranty deed. Suit was brought to restrain the petitioner from taking possession of the property. The trial court denied relief, but the Supreme Court of Missouri reversed, holding that the agreements were effective and that its provisions violated no rights guaranteed to the petitioners by the Federal Constitution.[8]

An examination of the facts shown in the report of the *Shelley* case discloses that there is involved in the deed a racial restrictive covenant to be effective for a period of fifty years. It is, of course, clear that the *interest* involved in this case is one of contract (covenant) between the parties, with the *purpose* of restricting the racial occupation of the realty subject to this covenant. The ultimate effectiveness of any restrictive covenant must be dependent, if necessary, upon injunctive relief[9] or damages as a substitute for or in addition to the injunctive relief. This leads to the elementary conclusion that it will take action of some degree by the court to issue and enforce an injunction, in addition to any judicial action in a determination of damages. Since the instant case dealt with injunctive relief, the following consideration of the *Shelley* case will likewise be so limited.

Assuming the correctness of this fundamental conclusion, and proceeding to further determine what analysis the case at hand would require, it is apparent that the court had to answer no less than two questions.

1. Can an individual enter into a contract (covenant) with other landowners to restrict the future use or alienation of real property on the basis of racial origin or membership? Is such a contract legal with all corresponding legal rights as regard relief,[10] legal with limited rights

---

[7]343 U.S. at 4.

[8]Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946).

[9]CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 210 (2d. ed. 1947); TIFFANY, REAL PROPERTY § 582 (abr. ed. 1940).

[10]By this statement the writer is referring to those actions in which the final determination is determined by elements of the action presented considered in the light of established rules of law as contrasted with an action in which the outcome is determined by some prohibition in bringing or enforcing the action.

as regard relief,[11] or void as contravening the fourteenth amendment to the Federal Constitution?[12]

2. Assuming an affirmative answer to the first part of question number one, after the creation of such contract can the state, acting through its judiciary, enforce this contract without violating the prohibitions regarding state action[13] found in the fourteenth amendment?

The United States Supreme Court granted certiorari[14] and held, first, that the fourteenth amendment erected no shield against private conduct however discriminatory;[15] second, that the restrictive agreements standing alone could not be regarded as violative of any rights guaranteed to the petitioners by the fourteenth amendment, and as long as the purpose of those agreements were effectuated by voluntary adherence to their terms there would be no action by the state and therefore the provisions of the amendment would not have been violated;[16] and third, the action of a state court in enforcing a covenant by the use of an injunction is state action within the meaning of the fourteenth amendment,[17] such amendment referring to the exertion of state power in *all directions*.[18]

A completed analysis indicates that as a result of this case we now have a doctrine which does not affect the validity of the interest created but only affects the remedy or action desired by the litigant to insure fulfillment of rights granted to him by the interest. Likewise, the consideration reveals that the *interest* is one of covenant or contract, the

---

[11]Those actions which would be valid and capable of a determination solely on the merits shown in the facts, but because of the Statute of Frauds or statute of limitations cause such to be determined not by the acts of the parties but by the prohibitions found in those statutes.

[12]It has been generally understood that any action prohibited by the fourteenth amendment referred to state action, but see Gondolfo v. Hartman, 49 Fed. 181, 182 (1892), in which the court stated "any result inhibited by the constitution can no more be accomplished by individual citizens than by legislation and the court should no more enforce the one than the other." This statement's overtones of prohibition of individual action have been suggested as the reason for its being ignored. 45 MICH. L. REV. 733 (1947).

[13]For a brief review of actions which have been discussed in relation to the state action doctrine see Marsh v. Alabama, 295 U.S. 45 (1935); Powell v. Alabama, 287 U.S. 45 (1932); Corrigan v. Buckley, 271 U.S. 323 (1926); Moore v. Dempsey, 261 U.S. 86 (1923); Buchanan v. Warley, 245 U.S. 60 (1917); Brinkerhoff-Faris Co. v. Hill, 211 U.S. 78 (1908); Twining v. New Jersey, 211 U.S. 78 (1908); Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex Parte* Virginia, 100 U.S. 339 (1879).

[14]331 U.S. 803 (1947).

[15]334 U.S. at 13.

[16]*Ibid.*

[17]*Id.* at 14, citing Civil Rights Cases, 109 U.S. 3 (1883), for the proposition that "state action of every kind" was prohibited.

[18]For a conflict in the application of this doctrine when the litigation presented judicial action of a different nature, see Barrows v. Jackson, 346 U.S. 249 (1953).

purpose is one of racial restriction, and the doctrine set forth finds its restrictive nature based on the nature of the interest which required positive action by the state court, thus, state action.

Suffice it to say that this decision perplexed many writers, and it gave rise to many questions by those who considered the possible application to other interests in property.[19] This doctrine presents some questions which have been answered and a multitude of questions which have not yet been answered.[20]

The decision has been said to hold that such covenants are "legal but unenforceable."[21] This phraseology may be accurate,[22] but it serves no whit to answer the questions which may arise in the future.[23] The lack of harmony on the proper applicability of the doctrine found in the *Shelley* case was amply demonstrated by a later case[24] answering one question which had puzzled many writers. The question was whether damages could be recovered by a plaintiff for the defendant's breach of a racial restrictive covenant. This question was answered in the negative.[25] The United States Supreme Court held that to compel one to respond in damages would be to punish for failure to perform this

[19]For a discussion of the problems presented see 1 ALA. L. REV. 15 (1948); 32 CHI.-KENT L. REV. 226 (1954); 1 FLA. L. REV. 453 (1948); 46 MICH. L. REV. 978 (1948); 27 N.C.L. REV. 224 (1949); 17 U. CINC. L. REV. 277 (1948). At the time the decision in the Shelley case was rendered the coverage of the problem incidental to this decision reached widespread proportions. See U.S. News & World Report, May 14, 1948, p. 22, for a discussion of the problems concerning forfeiture of liquidated damages.

[20]For a discussion and criticism of the Shelley case in relation to future problems see 1 OKLA. L. REV. 290 (1948); and, for other articles dealing with this type problem see 45 MICH. L. REV. 733 (1948); 35 COLUM. L. REV. 149 (1935). One such problem was presented in the case of Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953), where a caucasian widow of an Indian who was killed in the Korean conflict had previously purchased a cemetery lot subject to an agreement which restricted the burial rights to those who were caucasians. The cemetery refused to allow her to bury her husband in the cemetery. The defendant cemetery asserted this provision and the trial court rendered a judgment in favor of the defendant. On appeal the Supreme Court of Iowa asserted neutrality and stated that the parties were merely being left to their contract. The Supreme Court of the United States granted certiorari, 347 U.S. 942 (1954), and affirmed the decision of the state court, 348 U.S. 80 (1955), but later withdrew the opinion on the ground that certiorari had been improvidently granted. 349 U.S. 70 (1955).

[21]Note, 27 N.C.L. REV. 224, 229 (1948).

[22]This becomes clear when it is noted that the court does not state that such contract is contrary to the prohibitions found in the fourteenth amendment, but only that judicial enforcement by injunction is prohibited as being state action.

[23]This is due almost entirely to the failure of the court to delineate the nature of action which would be state action, and as a consequence any rationale of the necessary elements to make an act fail within this prohibited category remains a matter of conjecture.

[24]Barrows v. Jackson, 346 U.S. 249 (1953).

[25]346 U.S. at 260.

covenant. However, in this case the late Chief Justice Vinson, who had written the unanimous six member opinion[26] in the *Shelley* case, dissented stating:

> These racial covenants whatever we think of them are not legal nullities [and] . . . it is not unlawful to make them. It is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or Federal Statutes.[27]

This statement would appear to illustrate that the applicability of the doctrine found in the *Shelley* case and that which will constitute "enforcement" so as to contravene the prohibitions of the fourteenth amendment were not perfectly understood even by those who formulated the doctrine.

The problem to be considered here, quite briefly stated, is what effect does the doctrine found in the case of *Shelley v. Kraemer* have on other methods of conveyance of estates and other interests in real property.

III. Comparative Application of Doctrine

Two relatively recent cases have prompted the consideration given to this problem. The first of these is the case of *Charlotte Park and Recreation Commission v. Barringer*.[28] This case involved an action for a declaratory judgment to determine the validity of certain reverter clauses. The facts found by the court were that the plaintiff, a corporate body, had received from certain individuals a deed to certain land upon certain stipulated conditions. The deed in the granting clause conveyed the land to the plaintiff "upon the terms and conditions, and for the uses and purposes as hereinafter fully set forth."[29] In part the deed provided that the land was "for the use of, and to be used and enjoyed by persons of the white race only."[30] The deed provided further:

> In the event that the said lands comprising the said Revolution Park area as aforesaid . . . or in the event the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only . . . then in either one or more of the said events, the lands hereby conveyed shall revert in fee simple . . . ."[31]

---

[26]Justices Reed, Jackson, and Rutledge took no part in the consideration or decision in the Shelley case.

[27]346 U.S. at 261.

[28]242 N.C. 311, 88 S.E.2d 114 (1955).

[29]*Id.* at 313, 88 S.E.2d at 117.

[30]*Ibid.*

[31]*Ibid.*

In a determination of just what is presented here, notice three things. (1) The limitation would apparently create an estate comprised of an interest which would last forever if the divesting contingency did not occur, or which would cease upon the occurrence of the event limiting the duration of the fee. (2) The relief prayed for would be an opinion as to the interest conveyed and as to the validity of the limitation on the fee in the light of *Shelley v. Kraemer*. (3) The relief prayed for—a declaratory judgment—has all the effect of any other decision and is res judicata,[32] and as contrasted with an injunction, as sought in the *Shelley* case, lacked the elements of injunctive determination, penalties for violation of the injunction, and other subsequent judicial regulatory action.[33]

The Supreme Court of North Carolina, in rendering its decision, quoted from the well known case of *First Universalist Society v. Boland*[34] in discussing the determinable fee:[35]

> The terms of the deed "do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event it is what is usually called a determinable or qualified fee."[36]

The court then went further to show that a determinable fee was recognized in North Carolina as a valid interest in land;[37] that the

---

[32]26 C.J.S. *Declaratory Judgments* § 1, at 50 (1956).

[33]The basic distinction made at this point is that when the court is concerned with a covenant the court can decide that the covenant has been breached, but because of some outside factor, generally changed circumstances, the court may refuse to either enjoin or give damages. It may therefore be said that a covenant affects the person holding the estate so subjected and that, in essence, the covenant acts on a person. To the contrary, the words in limitation of the duration of the fee, by their definition, act in and of themselves to vest the fee in another. Consequently, it could be said that this operates on the duration of the estate—thereby it acts on the interest and not the person (other than to divest him of the interest he had in the estate).

[34]115 Mass. 171, 29 N.E. 524 (1892).

[35]This is defined in 1 TIFFANY, REAL PROPERTY § 220, at p. 383 (3d ed. 1939), as "An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event." See SIMES, FUTURE INTERESTS §§ 11, 12 (1951), for a concise explanation of the determinable fee and some of its characteristics. See also RESTATEMENT, PROPERTY §§ 16, 23 (1936).

[36]242 N.C. at 317, 88 S.E. 2d at 120.

[37]*Id.* at 316, 88 S.E.2d at 119, quoting from the case of Hall v. Turner, 110 N.C. 292, 14 S.E. 791 (1892), in giving the definition of a base, qualified, or determinable fee as recognized in North Carolina.

instant restraints did not violate the Rule Against Perpetuities;[38] and, that if the event specified which would divest the plaintiff of title occurred, the fee would revert to Barringer.[39]

The North Carolina court, after reviewing the basis for such an interest in North Carolina and elsewhere and whether such interest would therefore be recognized, further stated that "the operation of this reversion is not by any judicial enforcement by the State Court of North Carolina and Shelley v. Kraemer . . . has no application."[40] In effect, the Supreme Court of North Carolina recognized the determinable fee as a method of conveyancing realty in that jurisdiction; that such interest had a basis in past decisions; that such conveyance fell outside the doctrine of the *Shelley* case; that such fee did revert without action of the court, thus no state action. After consideration of the instant problem and the opinion rendered by the North Carolina court, the Supreme Court denied certiorari.[41]

In concluding the consideration of this case, it is pointed out that the *interest* in this case is one which affects the duration of the fee if the contingencies precedent occur. The grantees and subsequent holders have a determinable fee, and the original grantor has a possibility of reverter. The nature of the *interest*, unlike that of covenant, is not dependent upon action independent of the creation of the interest. The *purpose* of the creation of the interest is similar in that it served to restrict the use of the property to those of a particular race. In the *Shelley* case the remedy required affirmative action of a court before the interest therein could be secured. The interest in the *Barringer* case was not dependent upon judicial action but operated to secure the rights in interest therein solely because of the terms of the original limitation.

The next case which prompted the consideration of the problem presented earlier is that of *Capital Federal Savings and Loan Association v. Smith*.[42] This case arose from an action to quiet title and for a declaratory judgment. The plaintiffs alleged that they were the owners of and in possession of certain property which the plaintiff's predecessor in title had agreed not to sell or lease to any colored persons. A forfeiture clause was the penalty for the breach of this provision. The litigation revolved around the construction and validity of the following provision:

> [I agree] not to sell or lease the said above described lots and parcels of land owned by them respectively . . . to any

---

[38] *Id.* at 321, 88 S.E.2d at 123.
[39] *Ibid.*
[40] *Ibid.*
[41] 350 U.S. 983 (1956).
[42] 136 Colo. 265, 316 P.2d 252 (1957).

> colored person or persons, and covenant and agree not to permit any colored person or persons to occupy said premises during the period from this date to January 1, 1990 . . . (further provided if such property) . . . shall be conveyed or leased in violation of this agreement . . . (the right, title, and interest) shall be forfeited to and rest in such of the then owners of all said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim.[43]

An examination of this provision discloses that there is an agreement not to permit colored persons to occupy the property; that such agreement is phrased so that upon the happening of an event the title would be divested from the then present owner and would vest in the present owners of the other property who would file a record claim.

The facts would indicate that as regards the *interest* in the instant case there was an attempt to create either a determinable fee, a fee subject to a condition subsequent,[44] or a forfeiture interest dependent upon a filing of record notice, which would appear to be an attempt to create an interest unknown to the common law.[45] The *purpose* of the limitation is the same as in the *Shelley* and *Barringer* cases.

It was the argument of the defendants that such provision created an interest in the land known as an executory devise. They asserted that the "interest vested automatically in the defendants upon the happening of the events specified in the original instrument of grant, and the validity of the vesting did not in any way depend upon judicial action by the courts"[46] of that state. In this case, however, the reply by the court was:

---

[43]316 P.2d at 254.

[44]"The term 'condition subsequent' denotes that part of the language of a conveyance by virtue of which upon the occurrence of a stated event, the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent but which will continue unil this power is exercised." RESTATEMENT, PROPERTY § 24 (1936). Assuming that the instrument in the Smith case did create a condition subsequent then the problem any court must face is whether they should destroy the condition subsequent, enlarge the fee, and deprive the holder of the condition subsequent of this property right. This conclusion in turn would have to be based upon the idea that the condition subsequent is void, which is not the holding in the Shelley case.

[45]The contingency limiting the duration of a fee when the determinable fee is in issue is usually the occurrence of an event which operates to divest the owner of the fee without regard to other external action which is required as a condition precedent to the divesting event vesting an interest in the one holding the possibility of reverter. Similarly, if a right of entry which is created by a condition subsequent upon the occurrence of the specified event is so created, then the method of securing this interest will be by exercising the right of entry. This writer's research has failed to disclose any record of an interest which has been subject to a condition precedent composed of an unrelated ministerial act.

[46]316 P.2d at 254.

> No matter what ariose terms the *covenant* under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so *has been definitely settled* by the decisions of the Supreme Court of the United States. *High sounding phrases or outmoded common law terms* cannot alter the effect of the agreement embraced in the instant case.[47] (Emphasis added.)

Other than that which is clearly stated—that the interest created or attempted to be created in this limitation falls within the doctrine found in the *Shelley* case—the opinion fails to draw any distinction between a covenant subject to equitable enforcement by injunction and other interests which are not dependent upon judicial action for their operation. It fails to suggest what action by a court would be considered state action. It also completely omits any attempt to define the estates and interests recognized in the jurisdiction which might be affected by the decision. The court made the statement that it "has been definitely settled" that such a covenant violates the fourteenth amendment to the Federal Constitution. Because the United States Supreme Court had ample opportunity to rule upon this method of conveyancing or a similar transfer of interests in the *Barringer* case this writer suggests that this statement completely lacks authority.[48]

The Colorado court did not consider the nature of the interest in the *Shelley* case, the nature of the interest in the case before the court, or the interests and estates recognized in Colorado. Therefore, the statement must be considered to be in error and misleading. It is not suggested that the result of this case is erroneous—but that the solution to the instant problem is not aided by an *ipse dixit* statement covering such a complex problem. The language, "high sounding phrases" and "outmoded common law terms," suggests that either the court is completely lacking in a fundamental knowledge of the creation of estates and interests, or that perhaps this jurisdiction has a method of conveyancing and other means by which they create estates and interests which is completely unrelated to any basis of ownership known to the common law.[49] Furthermore, the court could

---

[47]316 P.2d at 255.

[48]Research has failed to disclose any United States Supreme Court decision applying the doctrine of the Shelley case to a conveyance of a determinable fee.

[49]The reader might also notice a recent Colorado case, Conway Bogue Realty Investment Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957), where the Denver Bar Association brought an action to enjoin real estate brokers from preparing receipts and options, deeds, promissory notes, deeds of trust, mortgages, releases of encumbrances etc., and where such was clearly violative of Colorado Law (COLO. REV. STAT. ch. 12, § 17 (1953)). the Colorado court after reviewing the effects of such practice throughout their state over a considerable period of time denied the relief sought, stating that "the record is devoid of any instance in which the

have noted when examining the instrument that a problem of state action was presented. The deed required that the owners file a record claim, thereby presenting the question of whether the maintenance of records by a state agency could be state action. If this question was answered in the affirmative, the somewhat questionable action of recordation could have been prohibited and the event upon which vesting was contingent would never occur. Other than the possibilities mentioned above, the court could have considered that this instrument might have created a condition subsequent, giving a right of entry to the defendant or the grantees holding under this instrument. If, pursuant to this condition, the plaintiff had set up this condition as a defense, could such a defense be given judicial recognition?[50]

It is interesting to note that this court tackled a perplexing problem in reaching the decision without giving more than a cursory coverage to the underlying, fundamental problems. It appears that according to the common law of most jurisdictions the limitation presented would have violated Rule Against Perpetuities since it would have been possible that the interest would not have vested within a life in being plus twenty-one years. Further, if the court had desired a valid alternative basis for the result, as suggested previously, the instrument under consideration apparently attempted to create an interest unknown to the common law. If, on the other hand, the court did not wish to delve too deeply in the law regarding creation of interests, then the court could have held that the term "colored" was not such a term which had a precise enough definition upon which the court could enforce these provisions.[51]

IV. Conclusion

The doctrine promulgated by the court in the *Shelley* case found its basis in two factors. The first of these was that the nature of the interest in that case required action of an affirmative nature—a covenant demanding for its effectiveness injunctive action, which the court felt was state action within the meaning of the fourteenth amendment. Needless to say, state action not predicated upon a prohibited purpose is without the scope of the fourteenth amendment. The purpose found

public or any member thereof has suffered injury by reason of the act of the brokers." This case may be significant of the attitude of the court toward the consideration of property interests—the basis for the decision in the Smith case, therefore, becomes to some degree explainable. *But see*, Simes, Future Interests, § 12, at 43 (1951), for authority for the proposition that "the American Courts have uniformly recognized the determinable fee and . . . there is not one decision which denies its existence."

[50]See case at note 20 *supra* which appears to indicate that this could be a defense.

[51]See *In Re* Wren, 4 D.L.R. 674 (1945), for uncertainty as to "Jews" and "persons of objectionable nationality" and, Clayton v. Ramsden, 1 All E.R. 16 (1943), as to uncertainty of terms "who is of Jewish parentage and of the Jewish faith."

in the creation of the interest to be enforced supplied the second element to the creation of the doctrine under consideration. It is likewise clear that unless action is required by the nature of the interest it is useless to consider the purpose of its creation. For this reason, and as suggested earlier in this article, when the doctrine found in the *Shelley* case becomes an issue as to whether it is applicable, the fundamental problem of the nature of the interest in the case at hand must be solved first. If in such case the court finds that it is necessary that it requires an act before the interest can be secured in enjoyment by the holder thereof, then the doctrine becomes applicable. On the other hand, if the court finds that the operation of the interest to secure this interest in another does not require an affirmative act, then the doctrine is inapplicable.[52] For the foregoing reasons this writer, like many others who are similarly interested, is curious as to the future application of this doctrine and as to the considerations which will be given by courts in the future to the underlying basis of this doctrine.

---

[52]This would apparently be the case when the court is concerned with an instrument conveying a determinable fee. As regards the operation of the instrument to vest interest in another (and correspondingly the former estate ceases) consider the statement that "in the case of an estate on special limitation (determinable fee) the words of the contingency are regarded as part of the limitation itself, and so as not cutting off an estate previously limited, but as merely naming an alternative limit to the duration of the estate." 1 TIFFANY, REAL PROPERTY § 217, at 380 (3d ed. 1939). Assuming the validity of this statement and the occurrence of the specified event, the only question remaining is as to the holder of the reversionary interest.

State Bar Section

THE UNITED STATES LAWYER— OUR GREATEST NATIONAL RESOURCE IN THE COLD WAR*

The United States is in the midst of an all embracive war. This is a new kind of war but none the less a fight to the finish, with no possible alternatives. Its outcome will amount to life or death for our profession as lawyers, for democratic government, for our clients' businesses, and free enterprise as we know it. To some it may appear that the victor in this struggle will be the nation who excels in the conquest of space, the accuracy of missiles, and production of super bombs of fifty megatons or better; but undoubtedly the war will not be won or lost in the race for arms. While the U.S.S.R. attracts world attention by testing bombs twenty-five hundred times more powerful than the explosion that devastated Hiroshima, communism wages its real conquest of the free world by seizing and capturing underdeveloped nations with political subversion and promises of a better economy—in most cases with little or no military action.

In such a war, we have not yet used the most powerful forces at hand to win the peace and preserve our liberties—the lawyers of the United States. In our democratic society, we have the freedom of choice to be either active or passive, a doer or an onlooker, as we please. We as lawyers may simply choose to stand and watch the world go by or up in flames—that is our privilege. We, the architects of this great democracy in the 1770's, can turn out to be the little lambs who lost their way in the 1960's. But by the same token, the lawyers of our nation may also voluntarily get into ranks and provide some of the leadership so desperately needed to win this new kind of world conflict.

On August 5, 1961, the United States and eighteen Latin American nations met in Punta del Este, Uruguay, and shortly thereafter the Alliance for Progress Pact was signed. By the way the Pact is carried out in the Western Hemisphere, we of the West can demonstrate to the whole world our abilities for cooperation within the framework of democracy, freedom, and private enterprise. In general, one of the fundamental challenges of our times is to establish constructive, cooperative relations between the industrialized, economically advanced nations and the developing countries in Asia, Africa, and Latin America. The lawyers of the United States are inevitably concerned in an acute way with the whole problem, but Latin America presents our most immediate challenge.

Many segments of America's business, education, and professional

---

*By David Cottrell, Jr. of Gulfport, Mississippi; Chairman, American Bar Association, Special Committee on Relations with Lawyers of Other Nations.

life are strongly conscious of their responsibilities and opportunities to assist in creating better relations with their counterparts in Latin American countries and are vigorously helping them and the United States achieve our hemispheric goals. But let me say emphatically that I believe the legal profession of the United States can make a larger contribution and render a greater service to Latin America than any other learned profession. There appears to be an urgent need in Latin America for a more accurate understanding of our government and its modern laws dealing with free enterprise, as well as an appreciation for the fact that our industrial economy was built upon constitutional democracy and is dependent upon modern legal concepts. No other group of professionals in the United States is equipped to provide this knowledge as well as its lawyers and law schools. Recognizing these responsibilities, as well as our opportunities for co-operation with lawyers throughout the free world, the American Bar Association Special Committee on Relations with Lawyers of Other Nations proposes to render the following service during the current Association year:

a. to aid in creating a better understanding of the history, geography, laws, culture, problems, and aspirations of Latin American countries, among our profession, and to encourage travel of United States attorneys in these countries;

b. to aid in assisting, when requested, the raising of standards of legal education in Latin America and other countries;

c. to encourage courteous and cordial reception centers for foreign lawyers visiting in this country, as well as orientation in bar association activities, operations and objectives;

d. to provide for visiting Latin American and other foreign lawyers information as to the operation and function of our judicial system in the United States;

e. to demonstrate to visiting foreign lawyers the practical aspects and procedures of law office management and courtroom techniques;

f. to encourage the translation and distribution in foreign countries of basic U.S. documents, modern U.S. laws and legal writings;

g. to encourage local and state Bars to make broad contacts with lawyers of the free countries of the world;

h. to cooperate with the Inter-American Bar, the Committee on World Peace through Law, and other American Bar Committees dealing with lawyers of other nations.

Recently President Kennedy gave his "Alianza para el Progreso" speech stressing multilateral cooperation for social and economic progress in Latin America. Thereafter Treasury Secretary Douglas Dillon said, "We have now agreed that development in this hemisphere, better living for our peoples, is more important to us than what happens in any other part of the globe." The President has also said that the citizens

of our great country should decide in what ways they can serve our nation in this crisis. Traditionally the lawyers of the United States have been the leaders of the nation since its very birth. A majority of the signers of the Declaration of Independence were lawyers. The drafters of the Constitution of the United States were largely lawyers, and out of thirty-four men who have held the position of Chief Executive of our country, twenty-six have been attorneys, and three others have attended law school. By and large our state legislatures are made up of lawyers, and the Congress and the Senate of the United States, I am told, draw approximately sixty percent of their members from the legal profession. We now have a special challenge to serve our nation in a field in which we are trained to aid in bringing about closer political, social, and economic cooperation with the other countries of the free world.

While our A. B. A. Committee can render valuable assistance in initiating and coordinating programs, supplying source materials and the like, the most valuable work among our profession can be done at the "grass roots" level.

Our state and local bars might undertake the following:

1. Appropriate committees could be responsible for inviting a selected group of Latin American lawyers and judges to attend the annual state bar convention, providing them with interpreters where appropriate. Such visits could serve a very useful purpose in creating interest in the state bar association in the particular Latin American country or countries represented. Invitations to such lawyers from other countries should be extended, and such requests may be cleared through the American Bar Association's Special Committee on Relations with Lawyers of Other Nations or the Inter-American Bar Association.

2. Travel of United States lawyers into Latin American countries could be encouraged. It is one thing to study the relations of the United States to these countries in governmental documents, histories, and news accounts, and quite another thing to go to these countries and make personal contacts with responsible members of our own profession. To know a people is to have experienced first hand the atmosphere and environment of that people.

3. After contacts have been made with other bar associations, state bars may properly invite a limited group of Latin American attorneys to attend continuation studies and seminars where such programs are scheduled in fields of the interests of Latin American lawyers.

4. The committee should hold at least one seminar for local and state bar lawyers. This orientation should deal with the geography, history, and background of Latin American countries, Latin American laws, and the present programs of the United States government aimed

at cooperation in advancing economic and social progress in Latin America.

5. A Fullbright scholar to Brazil recently returning to this country has said:

> There is an alarming lack of current literature on American legal systems and legal thought in the libraries of Latin America. The few books that they own, and only the larger cities have any, are either far outdated or by secondary authors. Consequently American justice is both misrepresented and misunderstood by most of the lawyers and jurists in Latin America. The average law graduate has little idea of current trends and modern legal thinking in the American legal world.

Commenting further, he said:

> I do not have to explain to you that the law students are among the most important segment of the youth in Latin America. They are political leaders of tomorrow and the source of political agitation today. They are eager and genuinely concerned about the conditions of their countrymen; yet the formation of their thought, which will shape the policies of these nations, is being developed in almost complete ignorance of the social progress which has taken place in the United States. . . . We must supply these people with the best of our legal thought. . . . We must send them our legal literature. . . . There are only forty-three law schools in all of Brazil; for us to supply every law school in the continent with a copy of our foremost law reviews would take no more than one hundred extra copies of each edition.

The appropriate committee of each state bar might inform the Special Committee on Relations with Lawyers of Other Nations whether or not it is possible to make available a limited number of copies of law reviews of its state universities for placement in libraries of Latin American countries, and if so what quantity would be available. State bars might also inform their American Bar Association Committee whether it would like to donate additional law books to libraries of Latin America. The American Bar Association Committee would of course make the arrangements to assure that the books and law reviews available and useable would be placed where needed most.

If every state bar association would exert a strong effort in this field, programs would readily come into being which when added together would do a great deal to help correct misconceptions in Latin American law schools about laws of the United States.

6. Some of the state bars might desire to assist the American Bar Association in having some of the basic United States documents, such as the Constitution of the United States, the Declaration of Independence, selected Federalist Papers, and the like, translated into Spanish

or Portuguese. These documents could then be circulated to the law libraries of Latin America. In this connection, it is well to point out that approximately one-third of the people of South America speak Portuguese. Therefore translation in this language should not be neglected.

The above are only some of the things that can be done at the local and state bar level with much benefit to our nation. No doubt each of these state and local committees will in turn develop new and additional ideas for establishing contacts and discovering areas of cooperation with lawyers of these nations.

Recently an ambassador from a foreign country had this to say about current conditions, and the role of those who now live in the free world: "We witness a global contest between freedom and totalitarianism at a stage that is decisive. The free world has the resources to win this contest. *Has it the imagination and the will to win?*"

I am sure that we have. The lawyers of America have not lost their ability to lead. I predict that when the lawyers of the American Bar Association at the state and local bar level become active in helping win this cold war and in improving relations in our hemisphere and throughout the world we will begin to win the cold war. It is certainly a fact that no other identifiable professional group in the United States has a greater appreciation of free enterprise and constitutional democracy than the United States lawyer, nor a greater capacity to join with lawyers of other free nations in presenting the merits of the democratic system of government and the legal machinery necessary for social and economic progress with a maximum of retained personal freedom.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII MARCH 1962 NUMBER 2

THE LAW JOURNAL EDITORIAL BOARD

JOHN R. BRADLEY, JR.
Editor-in-Chief

L. F. SAMS, JR.
Assistant Editor

WILLIAM TIMOTHY JONES
Article Editor

JOHN M. ROACH
Index and Review Editor

JOHN H. HOGUE, JR.
Casenote Editor

JAMES KEARNEY TRAVIS, JR.
Research Editor

HARRY L. CASE, JR.
Comment Editor

VERNON L. TERRELL, JR.
Business Manager

ROBERT K. RUSHING
Faculty Advisor

THE LAW JOURNAL STAFF

Neal Brooks Biggers
James Thomas Caldwell
John H. Cheatham III
Richard M. Edmonson
Arnold F. Gwin
Paul Tudor Jones V
Lloyd G. Spivey, Jr.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

Student Comments

FEDERAL ESTATE TAXATION OF FUTURE INTERESTS

I. Introduction

The main Internal Revenue Code sections pertaining to future interests are section 2033 and section 2037, entitled "Property in which the Decedent Had an Interest" and "Transfers Taking Effect at Death," respectively. This comment will be devoted to the application of these two sections to the various future interests. Due to the innumerable ways future interests can be created it is impossible to deal with all of the factual situations; therefore, only the more common situations are discussed. The purpose of this comment is not to aid in the determination of what interests have been created but rather in determining which, if either, of the above sections will be applicable. It is also intended to be of aid to the legal draftsman by presenting various methods by which estate taxes can be minimized. Since the laws of the states vary, only common law interests are discussed.

It should be noted that the law of the state of the domicile of the decedent is generally controlling in determining the interest of the decedent at the time of his death. This rule applies to both section 2033[1] and section 2037[2] of the Internal Revenue Code. The rule is especially important where a state court has already rendered a decision as to the interest of the decedent in connection with some matter of state law. Then there remains only the question of the amount to be included in the decedent's gross estate, as the interest present has already been determined. The state proceeding, however, must have been "entered upon a real controversy regularly submitted for determination and not a feigned or collusive proceeding."[3]

II. Property in Which the Decedent Had an Interest

A. Generally

"The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of the interest therein of the decedent at the time of his death."[4] It should be noted that when an interest is found taxable under this section only the value of the interest itself, computed by the use of actuarial and mortality tables, is included in the gross estate.

For purposes of the Federal Estate Tax, remainders are divided

---

[1] *E.g.*, Kinney v. Commissioner, 80 F.2d 568 (9th Cir. 1935).

[2] *E.g.*, Slade v. Commissioner, 190 F.2d 689 (2d Cir. 1951).

[3] William O. Burton, 16 P-H Tax Ct. Mem. 406 (1947).

[4] Int. Rev. Code of 1954, § 2033.

into two categories: (1) vested remainders and (2) contingent remainders. Professor Gray draws the following distinction between vested remainders and contingent remainders:

> A remainder is vested in A., when, throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine. A remainder is contingent if, in order for it to come into possession, the fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary.[5]

B. Vested Remainder

1. *Generally*

A vested remainder will generally be includible in the gross estate of the decedent and taxable under this section even though death occurs before enjoyment of possession. For example, if A grants Blackacre to B for life and then to C and his heirs, C has a vested remainder which will be included in his gross estate even if he predeceases B and never actually has possession of Blackacre,[6] the theory being that a vested remainder is capable of being transferred by the decedent upon his death and therefore it should be treated as a taxable interest. On the other hand, a contingent remainder is not taxable under this section unless it is one that is capable of being transmitted upon the decedent's death.[7] Thus, if A conveys property to B for life, then to B's children living at B's death, and B has a child C, C has a contingent remainder which will not be taxed under section 2033 if C predeceases B because C's interest in the property terminates. But suppose C transfers his interest to X. Upon X's death the interest will descend to X's heirs. Since it will descend upon X's death, the contingent remainder will be taxable under 2033.

2. *Subject to Condition Subsequent*

It seems that the same would be true of a vested remainder subject to a condition subsequent. For example, if A grants Blackacre to B for life, remainder to B's child C when he shall attain twenty-one and C dies before he attains twenty-one, this interest would not be included in C's estate because it terminated on his death prior to his reaching the age of twenty-one. From the above it would appear that for purposes of section 2033 the test as to whether the remainder will be taxed is simply whether his death was a condition or contingency which

---

[5]GRAY, THE RULE AGAINST PERPETUITIES 89 (4th ed. 1942).

[6]See, *e.g.*, Frazier v. Commissioner, 162 F.2d 167 (3d Cir. 1947).

[7]Rev. Rul. 55-438, 1955-2 CUM. BULL. 601.

terminated his interest. If the answer is affirmative it will not be taxable, but if negative it will be taxable.

3. *Subject to Divestment—Distinguished from Contingent Remainder*

Many of the technical property law distinctions between different interests are unnecessary when dealing with estate tax law. The court in *Estate of Field*[8] said the following in regard to the technical distinction between a contingent remainder and a vested remainder subject to divestment:

> In our opinion it is unnecessary to determine whether William B. Field's interest in the residuum of his father's estate was a vested interest subject to being divested by his death prior to the distribution of the final residuum or whether it was an interest contingent upon his survival until such distribution. In either case, since William B. Field did not survive until the distribution of the final residuum of his father's estate, no interest in the items of the personal and real property passed to William B. Field's estate. It follows that no part of the value of these items should be included in the gross estate of William B. Field for the purposes of Federal taxation.[9]

4. *Subject to Partial Divestment*

The only remainder which seems to create much of a problem is that of a vested remainder subject to partial divestment. The problem involved is the amount of the tax, for the interest is obviously taxable since the decedent could transmit it at his death. Although there is no case directly in point, it would appear that the amount would be computed by use of actuarial tables, taking into consideration the ages of the parties involved. For example, A to B for life, remainder to the children of C in fee simple, and C has two children D and E. In this instance the age of C and his marital status will probably be the determining factor in computing the value of D's vested remainder subject to partial divestment. It should be noted that the mere fact the value of an interest is uncertain does not prevent its valuation because the courts seem to feel that a fair guess is better than no valuation since it will usually be closer to the actual value than simply no evaluation whatsoever.[10]

C. Limitations

1. *Rule Against Perpetuities*

Two of the more notable rules of property law should be considered and their role in taxation determined under section 2033. First,

[8] 22 B.T.A. 915 (1931).

[9] *Id.* at 919.

[10] Bodine v. Commissioner, 193 F.2d 724 (2d Cir. 1952).

a consideration of the role of the Rule Against Perpetuities is necessary. This common law rule is used mainly in determining the property in the estate of the grantor. If it can be shown that a grant violated the Rule, then it will be void and the property might be includible in the grantor's estate under section 2033. The part of the grant within the Rule will be unaffected by the same except that it may increase a transferee's interest. Where an interest has been held void for remoteness under a different factual situation the same interest may pass to the transferee through the laws of intestacy and therefore be includible in decedent's gross estate. A person who did not take under the grant may be found to have a taxable interest via the law of intestacy where the grant violates the Rule Against Perpetuities.[11] In other words, the role of the Rule can be said to be that of determining who has an interest taxable under section 2033 and the size of the interest.

2. *Doctrine of Worthier Title*

In drafting an inter vivos conveyance one must be cognizant of the Doctrine of Worthier Title if it is in existence in his state.[12] For example, if A transfers property in trust with the income payable to his wife for life and then to his heirs, the Doctrine of Worthier Title would apply and his heirs would not take as remaindermen, but rather the grantor would be considered as having a reversion in the property which would be taxable under section 2033.[13]

D. Contingent Remainders

In planning an estate a tax saving can be obtained by the use of contingent remainders rather than vested remainders. The saving will not be realized by the estate of the testator but by his transferees. For instance, if A devises Blackacre to his wife for life, remainder to his son, the vested remainder will be includible in the son's gross estate if he predeceases his mother. But the testator's intention could have been reached just as easily by the use of a contingent remainder, and at the same time a tax saving would inure to the son's estate. The will could have provided to the wife for life and if the son survives the mother remainder to him, but if he predeceases his mother then to X. The son's interest here is contingent upon his surviving his

[11]See George M. Henderson, 45 B.T.A. 1080 (1941).

[12]Apparently the Doctrine of Worthier Title exists in Mississippi. See West Tenn. Co. v. Townes, 52 F.2d 568 (N.D.Miss. 1931).

[13]See Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A. L. REV. 371, 400 (1949).

mother, and therefore at his death prior to his mother's the interest terminates and will not be included in his gross estate.[14]

E. Executory Interests

It is important to note in the above example that X has an executory interest which will probably be taxable under section 2033. It is said that "a contingent interest belonging to a decedent at his death will be taxed to his estate under section 2033 if the contingency is something other than the decedent's survival, so that he has an interest which he can transmit at his death."[15]

One main category of interests which would seem to fall within this statement is executory interests. Assuming that both the wife and the son are living at X's death, X would have an interest capable of transmission at his death, for until the wife dies it is not known whether the son or X will take Blackacre. The contingency is not X's survival, so apparently his interest would be includible in his gross estate.

F. Reversions

Since all reversions are vested estates, the problem is not as great as it is with remainders. There is little doubt that if a decedent had an indefeasible reversion it would be includible in his gross estate as would a possessory interest and would be taxable under section 2033 as property in which the decedent had an interest.[16] Thus, if A grants a life estate to B with reversion to A or his estate, A's reversion would be taxable because it is transmissible. Suppose A establishes a trust with the following provisions: reservation in wife of power to revoke; income to wife for life; right to wife to transfer corpus, and at her death the right to A. A has a reversion which is subject to complete divestment. When he dies, even though his wife is still alive and has the power to revoke, the courts consider him as having an interest capable of being taxed under section 2033.[17] This is so because the power itself does not vest any interest in the donee, and until the power is exercised the interest is vested in the decedent. However, if the wife does exercise the power prior to his death, the reversion would not be includible in his gross estate because it had ceased to exist upon the exercise of the power of revocation.

---

[14]See 1 Bowe, Estate Planning and Taxation 32 (1957).

[15]Lowndes & Kramer, Federal Estate and Gift Taxes 35 (1956).

[16]*E.g.*, Adriance v. Higgins, 113 F.2d 1013 (2d Cir. 1940).

[17]See Waldo C. Bryant, 36 B.T.A. 669 (1937).

G. Remote Possibility of Reverter

There seems to be a split of authority on the taxability of a remote possibility of reverter. In *Estate of Henry*[18] the court held a possibility of reverter includible as an interest in the decedent's estate and said the remoteness of the interest pertained only to its valuation. But one year later the tax court in *Estate of Cardeza*[19] said an extremely remote interest will not be includible in the gross estate because an attempted valuation would be "mere speculation bearing the delusive appearance of accuracy."[20] There is no practical difference between these two cases since in neither was the interest held subject to a tax—one on the ground that its value was so minute that its value would be considered zero and the other that it was incapable of valuation and therefore not taxable. The first of these two theories would seem to be more reconcilable with the language of the statute and most courts. Of course, if the possibility of reverter is obliterated by the decedent's death it will not be taxable.[21]

Taxation of future interests under section 2033 of the Internal Revenue Code of 1954 could be summarized in the following manner: If the decedent has an interest which he can transmit at his death, he has an interest in property taxable under this section, but if the continued existence of his interest depends on his survival, then it terminates simultaneously with his death and he has no interest which can be included in his gross estate.

III. Tranfers Taking Effect at Death

A. Elements of Section 2037

1. *Generally*

The Supreme Court in *Helvering v. Helmholz*[22] held unconstitutional a retroactive estate tax which would include the entire property instead of just an interest. Therefore, it is necessary to consider the differences between the present section 2037 and its forerunners. This will be done in the discussion of the different requirements contained in the existing provision which is concerned with the taxation of reversionary interests. There are three principal elements required by this section: (1) that there be a reversionary interest; (2) that the reversionary interest be five per cent of the total value of the

---

184 T.C. 423 (1944), *aff'd on other grounds*, 161 F.2d 571 (3d Cir. 1947).

195 T.C. 202 (1945), *aff'd*, 173 F.2d 19 (3d Cir. 1949).

20*Id.* at 213.

21Rev. Rul. 55-438, 1955-2 Cum. Bull. 601.

22296 U.S. 93 (1935).

property; and (3) that the property be obtainable only by the survivorship of the transferee. Each of these elements will be discussed separately.

2. *Reversionary Interest*

A reversionary interest for purposes of this section includes a possibility that property transferred by the decedent may return to him or his estate or may be subject to a power of disposition by him.[23] The possibility that the income alone from such property may return to the decedent or become subject to a power of disposition by him will be taxable under section 2036 of the Internal Revenue Code of 1954. As can be seen a reversionary interest as used in this section has no technical property law meaning but is used to refer to any reserved rights under which property transferred by the decedent may or might return to him.[24]

A reversionary interest is required in all transfers made by the decedent in order to be taxable as a transfer taking effect at death. However, when the transfer of the property and the death of the decedent occurred between October 8, 1949, and August 16, 1954, only the survivorship element is required.[25] Before a transfer made prior to October 8, 1949, is taxable the reversionary interest must be expressly reserved; transfers subsequent to October 8, 1949, are taxable where the reversionary interest has been expressly reserved or created by operation of law.[26] The difference this might make is shown by *Commissioner v. Marshall's Estate*.[27] In that case the decedent created two trusts. One-third of each was for the benefit of his wife. At her death her portion of the trust was to be determined according to the law of intestacy in Pennsylvania. Under the intestate law the surviving spouse was entitled to one-third of the property if more than one child was alive. The court in this case held that this property in trust was not includible in the gross estate because the reversionary interest was created by operation of law and not by the express terms of the instrument. One might think that the decedent's reference to the intestacy law of a particular state constituted an express reservation, but the court said the law of intestacy might change or the decedent might obtain a divorce, and therefore this would not be the case. If the transfer had taken place after October 8, 1949, this property would have been includible in the gross estate of the decedent since section 2037

---

[23] INT. REV. CODE OF 1954, § 2037 (b).

[24] Treas. Reg. § 20.2037-1 (c) (2) (1958).

[25] Technical Changes Act of 1949, § 7, 63 Stat. 891 (1949), as amended, Revenue Act of 1951, §§ 607-09, and Technical Changes Act of 1953, § 207, 67 Stat. 615 (1953).

[26] See INT. REV. CODE OF 1954, § 2037 (a) (2).

[27] 203 F.2d 534 (3d Cir. 1953).

includes both express reservations and reservations created by operation of law. However, the regulations[28] have overruled the *Marshall* case by saying transfers prior to October 8, 1949, will be considered to contain express reservations "if the instrument contains an express disposition which affirmatively creates the reversionary interest, even though the terms of the disposition do not refer to the decedent or his estate as such."[29] The regulations then give an example which has almost exactly the same facts as those of the *Marshall* case.

One must be careful in drafting a trust because a reversionary interest may be created even though not intended. For instance, in *Estate of Thacher*[30] the decedent transferred property in trust with the income to his wife for life and remainder to other beneficiaries. In the facts stated there is no reversion, but the decedent retained the right to terminate the trust if he and his wife later became separated or divorced. The court, in holding the wife's interest includible in the decedent's gross estate as a transfer taking effect at death, said:

> This was a condition which affected the life estate of the wife and might terminate it at any time while the parties were alive. Only upon the death of the decedent was this possible termination of the wife's life estate removed. Only then did the wife's interest in the income of the trust ripen into an absolute, unconditional life estate, subject only to termination in event of remarriage.[31]

Section 2037 states that where the possession or enjoyment of the property can be obtained by any transferee through the use of a general power of appointment the property will not be taxable as a transfer taking effect at death. Anytime a trust agreement contains a general power of appointment, section 2037 is not applicable even if there is a reversionary interest of five per cent and the requisite survivorship.

3. *Value of the Reversionary Interest*

The reversionary interest will be taxable if "the value of such reversionary interest immediately before the death of the decedent exceeds five per cent of the value of such property."[32] The value of the interest is its value immediately prior to decedent's death, determined by the use of mortality and actuarial tables without regard to the fact of the decedent's death.[33] This is done regardless of whether the ex-

---

[28]See Treas. Reg. § 20.2037-1 (f) (2) (1958).
[29]*Ibid.*
[30]20 T.C. 474 (1953).
[31]*Id.* at 483.
[32]INT. REV. CODE OF 1954, § 2037 (a) (2).
[33]INT. REV. CODE OF 1954, § 2037 (b).

ecutor elects to have the estate valued one year after the date of the death of the decedent as he has the option to do under section 2032.[34] There was a period after *Spiegel's Estate v. Commissioner*[35] when a transfer was taxable regardless of the fact that the decedent retained only an infinitesimal reversionary interest. This absurdity was brought to a quick halt by Congress in the form of the Technical Changes Act of 1949,[36] and under present law the five per cent requirement exists whenever a reversionary interest is required.

Procedurally, there is a presumption that the value of the reversionary interest exceeds five per cent of the total value of the property, and therefore the burden is on the estate to show by use of actuarial and mortality tables that the interest was less than five per cent or that its value cannot be determined.[37]

The total value of the property is usually taxable under section 2037, whereas only the value of the interest is taxable under section 2033. The actual formula used to determine the value taxable is the total value of the property less any interest which a beneficiary can receive during the decedent's lifetime.[38] Thus, A creates a trust with income to B for life and remainder to C, but if C does not survive B then to A, or if A is not living then to X or X's estate. A predeceases B, C, and X. X's estate is the only estate which is dependent upon the survival of A. Therefore, it is the only interest which will be taxable under section 2037 since B's and C's interests could be received during A's life.[39] The reason B's and C's interests are not taxable under section 2037 is that they are not transfers taking effect at A's death but are transfers which took effect or could have taken effect during his life. An interest which does not depend upon survivorship is not included in the value to be taxed; however, it is included in the property when making a comparison between the total value of the property and the decedent's reversionary interest to see if his interest exceeds five per cent of the total value of the property.[40] If the reversionary interest of the decedent is only an interest in part of the property transferred, the value of decedent's interest will be compared only with the value of that part of the property in which he has an interest.[41] Thus, if the decedent retains a reversionary interest in only part of the property transferred—for example, one-half of a trust

---

[34]See Treas. Reg. § 20.2037-1 (c) (3) (1958).
[35]335 U.S. 701 (1949).
[36]Technical Changes Act of 1949, § 7, 63 Stat. 891 (1949).
[37]F. W. Thacher, 20 T.C. 474 (1953).
[38]See Treas. Reg. § 20.2037-1 (d) (1958).
[39]See Treas. Reg. § 20.2037-1 (e) (4) (1958).
[40]See Treas. Reg. § 20.2037-1 (c) (4) (1958).
[41]*Ibid.*

fund—only the value of the property in which he has the interest will be includible in his gross estate for tax purposes.[42]

It should be noted that an interest falling within section 2037 will also be valued even though there is uncertainty as to its actual value. However, if the possibility of enjoyment of an interest is so speculative and remote that the value is not ascertainable, even though in theory it does have some value, the courts will assume that its value is zero in which case the estate is not liable for any tax on it.[43]

4. *Survivorship*

Section 2037 states that the value of the property shall be includible in the decedent's gross estate if "possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent . . . ."[44] The survivorship element is required by statute except when the decedent died before August 16, 1954, and the transfer was made prior to October 8, 1949, but even during this period, survivorship is required by the regulations.[45] Therefore, it is the only requirement which must be present in every case regardless of the date of the transfer or the decedent's death. In fact, it is the only requirement which has to be present in order that the property be included in the decedent's gross estate, if the transfer was made between October 7, 1949, and August 16, 1954, and the decedent died before August 16, 1954. In the absence of the survivorship requirement there is no taxable interest. If A transfers property in trust with the income being payable to his wife for life and then to the children who survive his wife but if no surviving children then to A, there is no interest taxable under section 2037. The wife has an outright life estate, and although the children's interest is dependent upon their survival of the mother, it is not dependent upon their survival of the decedent. Neither the children's interest nor the interest of the mother would be includible under section 2037 even if the reversionary interest of the decedent were valued in excess of five per cent of the total value.[46] The decedent's reversionary interest, however, would probably be taxable under section 2033 since his interest does not terminate until the death of the mother and since he can transmit his interest at his death. On the other hand, if the trust had provided that the income would be payable to the wife for life and then to the children of A if they survive

---

[42]Treas. Reg. § 20.2037-1 (d) (1958).

[43]*E.g.*, S. H. Henry, 4 T.C. 423 (1944), *aff'd on other ground*, 161 F.2d 574 (3d Cir. 1947).

[44]INT. REV. CODE OF 1954, § 2037 (a) (1).

[45]See Treas. Reg. 105, § 81.17 (c) (1) (1948), as amended, T.D. 5834, 1951-1 CUM. BULL. 72.

[46]See Treas. Reg. § 20.2037-1 (e) (1) (1958).

A and if not then to A, there is no doubt that the children's survival of A is necessary before they can obtain possession and enjoyment of the income and corpus of the trust. The value of the children's interest plus the value of A's reversion will be includible in his gross estate under section 2037, assuming that his reversionary interest is in excess of the minimum five per cent required.

Another phase of this requirement is the case where the beneficiary can obtain his interest through the operation of an alternative contingency. For example, A, who is thirty years of age, transfers property in trust with the income to accumulate for twenty-five years or until A dies and upon the occurrence of the first of these alternatives the accumulated income and the corpus go to B. Under section 2037, the courts will consider that B was able to obtain possession and enjoyment of the trust property prior to the decedent's death, and the interest will not be includible in A's gross estate. But if A was seventy years of age when he made the transfer, the entire trust would be taxable because it would be extremely improbable for the alternative contingency to occur prior to the decedent's death. The alternative contingency will be labeled "unreal" and B's survivorship will be considered the only substantial contingency.[47] It is evident that if the alternative contingency occurs during the life of the decedent, it will not be taxable because the beneficiary obtained possession and enjoyment prior to the decedent's death. Similarly, if the transfer is dependent upon a condition far related from that of survivorship, it will not be taxable under section 2037 of the Internal Revenue Code.[48]

B. Avoiding the Tax under Section 2037 by Eliminating Requirements

1. *Original Conveyance*

a. *Reversionary Interests*

Upon examination it will be found that by the use of one of several methods taxation under section 2037 will be eliminated. The most obvious method is to leave one of the three essential requirements out of the instrument. This can often be done while still fulfilling the testator's intention and yet the advantage of a tax saving will be added.

In most instances it would be best to eliminate the nearly worthless reversionary interest since the possibility of its returning to the decedent's estate is extremely remote. When the reversionary interest is eliminated, other factors can be relied upon to bring about the same result. In proposing this it is realized that in some instances the grantor

---

[47]See Treas. Reg. § 20.2037-1 (e) (5) (1958).

[48]See, *e.g.*, Shukert v. Allen, 273 U.S. 545 (1927).

may insist upon retaining a reversionary interest in order to make certain that the property remains within the immediate family, as in the case of a family corporation's stock. The reversionary interest is often simply the result of poor draftsmanship since it was not actually essential to the fulfillment of the grantor's intention. For instance, suppose that the decedent simply does not want his children to take possession prior to his death and has no desire to retain a reversionary interest. One way to draft the instrument would be to transfer the property in trust to his wife for life with a remainder in his children, but if the wife should predecease him then the property to revert back to him. The grantor's reversionary interest will, of course, cause the property, less the wife's outstanding life estate, to be taxable under section 2037. The instrument could have been drafted to provide for the wife for life with income to be accumulated for the life of the decedent and then the accumulated income and corpus to go to his children upon the death of the survivor of their parents.[49] This would bring about the desired end and would also result in a tax saving since there is no reversionary interest to which section 2037 applies. The reversionary interest also could be eliminated by giving the ultimate remainder to a charitable institution. This would eliminate the reversionary interest so that it would not revert even in the event of the death of all the beneficiaries prior to the death of the decedent.[50]

b. *Value of the Reversionary Interest*

The next essential element which could be eliminated is that requiring the reversionary interest to be five per cent of the total value of the property. The elimination of this element is extremely dangerous because even the most accurate calculations made from mortality and actuarial tables cannot anticipate the occurrence of unexpected events. Thus, a person at the time of the transfer may by calculations have an interest of less than one per cent, but at the time of his death his interest may be more than five per cent as the result of the unexpected death of one or more of his intended beneficiaries. Therefore, it would be advisable to eliminate one of the other essential elements to insure nontaxation so as not to take the chance involved in relying solely on the fact that the interest is less than five per cent at the time of the transfer.

c. *Survivorship*

Finally, the elimination of the element of survivorship of the beneficiary may bring about a tax saving. This is the most difficult of the

---

[49]See 1 BOWE *op. cit. supra* note 16, at 390-92.

[50]1 ESTATE TAX TECHNIQUES 1225 (Lasser ed. 1961).

required elements to omit and at the same time achieve the intention of the testator. It is practically impossible to have the beneficiary take only after the decedent's death without having the beneficiary's interest depend upon his survival of the decedent. Of course, if the wife is thirty and the husband is fifty, and the wife receives a life estate with the remainder to his son, there is a good chance that his son will not take until after his death. There is, of course, always the possibility of the wife's untimely death in which case the decedent's intention would be defeated. If the wife is about the same age as the testator, it is apparent that there is no absolute solution to this problem. In conclusion it can be said that the estate planner could most easily and safely omit the reversionary interest to make certain that the property will not be included in his gross estate under section 2037. However, if the testator does not care when the beneficiary acquires possession and enjoyment of the property, then survivorship would probably be the easiest element to eliminate and thus remove the property from within the scope of section 2037. The property would still return to the testator or his estate in case of untimely deaths since the reversionary interest can be included without danger of taxation under section 2037. Of course, it will be taxable under section 2033, but the amount includible is usually so small that there will not be a large amount of tax as a result.

2. *After Original Conveyance*

One might encounter the situation where the testator has already made the transfer and because of various reasons is now more interested in saving his estate from the tax than he is in retaining a reversionary interest. In this situation there are three possible methods that can be used to reach the desired results. They are a gift, a release, or an outright sale.[51] The outright sale is the most desirable since it will give the testator cash which he will be able to spend prior to his death and which will be kept out of his estate. Even if he does spend it prior to his death, the tax on the amount will be much less than it would have been if the entire value of the property had been includible in his estate. The problem with a gift or release of the reversionary interest is that the decedent may die within three years, and then the gift or release might be considered as made in contemplation of death, putting the decedent right back where he started as a result of the operation of section 2033.[52]

---

[51]See *id.* at 1219.

[52]INT. REV. CODE OF 1954, § 2035(b).

IV. Conclusion

It will always be best when drafting an estate to create interests taxable under section 2033 rather than interests taxable under section 2037 since only the reversion itself will be taxed under 2033, whereas the entire trust might be thrown into the gross estate under section 2037. There will be some instances where it will not be possible to accomplish this and still achieve the intention of the testator. There may be some instances where one can eliminate the reversionary interest entirely and thereby avoid both sections. When dealing with granted interests, such as remainders, there is little that can be done to prevent their inclusion in the estate. The granted interest might be sold, but usually, especially with vested estates, the chance of receiving the property is worth more than the estate tax that would be incurred. Ordinarily it will be worth more to retain an interest under section 2033 than to try to eliminate it and avoid the tax, since the tax will probably be relatively small in comparison to the value of the property which one might receive. However, this is far from true when dealing with section 2037, because under this section the tax will usually greatly outvalue the chance of receiving the property. For example, suppose the value of the reversion was five per cent of the total value of the property, and the property was valued at five hundred thousand dollars. This would mean that the chance of receiving the property would be about twenty to one. This is a great chance to take when there is the possibility of having half a million dollars thrown into the gross estate.

The court in the case of *Estate of Henry*[53] described the difference between the sections in the following manner: "That section [2037] 'deals with property not technically passing at death but with interests theretofore created,' whereas section 302 (a) [2033] deals only with the interest in property which passes at death."[54] Another way to state this is to say that under section 2037 the interest itself must have been transferred inter vivos, becoming absolute only upon the decedent's death, whereas under section 2033 the interest itself is in the decedent until his death at which time it passes. For example,[55] suppose A grants property to his wife for life with remainder to B if he survives A; if B predeceases A the property will revert to A. A's reversionary interest will cause the entire value of the property to be thrown into his gross estate except for the wife's outstanding life estate. This is a consequence of the fact that A transferred inter vivos and B had his interest at A's death, but it did not become absolute and unconditional until A's death. But if A grants a life estate in property to his wife with the reversion in himself, and then leaves the property to B in his will,

---

[53] 4 T.C. 423 (1944) *aff'd*, 161 F.2d 574 (3d Cir. 1947).

[54] *Id.* at 444-45.

[55] See LOWNDES & KRAMER, *op. cit. supra* note 15, at 111.

the reversionary interest will be taxable under section 2033 because the decedent retained the interest until his death at which time he passed it to B. In summary, the beneficiary or transferee must have an interest prior to the decedent's death under section 2037, whereas under section 2033 the beneficiary or transferee does not acquire any interest until the decedent's death.

These two sections are mutually exclusive because the decedent's interest under section 2037 terminates at his death. There is nothing which can be transmitted upon his death so it is not taxable under section 2033. If the decedent has an interest taxable under section 2033 which he can transmit upon his death, then the interest will not be taxable under section 2037 because there was an absence of the element of survivorship. If the element of survivorship had been present, the beneficiary would have obtained an absolute interest and the decedent would have had nothing which he could have transmitted.

Luther L. McDougal, III

THE CREATION OF A POWER OF APPOINTMENT MARITAL DEDUCTION TRUST

I. Introduction

The purpose of this paper is to discuss the basic conditions that must be met in order to create a power of appointment trust that will qualify for the marital deduction. Primarily involved are the rights and powers given the surviving spouse in the trust instrument with respect to income and corpus. In approaching the subject an attempt is made to present applicable sections of the 1954 Internal Revenue Code and Treasury regulations. Next, certain cases are included in an effort to show the reaction of the courts to various restrictions imposed by the decedent upon the surviving spouse. Finally, several gerneralizations are offered which, it is hoped, will be of some assistance in drafting the trust instrument.

II. The Marital Deduction in General

The marital deduction provisions of the 1954 Code[1] are substantially the same as those of the 1939 Code.[2] The deduction is allowed for an amount equal to the value of an interest which passes or has passed from the decedent to his[3] surviving spouse.[4] The interest so passing must be included in determining the decedent's gross estate.[5] The maximum amount of the deduction may not exceed fifty per cent of the decedent's adjusted gross estate.[6] The interest, with certain exceptions, must not be one that is terminable.[7]

III. The Power of Appointment Trust

A. Code Provisions

The power of appointment trust under consideration is created by the decedent in favor of his surviving spouse. Generally the surviving spouse is given the right to income from the trust for life plus a power to appoint the corpus. Such an interest passing to the surviving spouse cannot qualify for the marital deduction under the above stated Code provisions, inasmuch as the interest is terminable.[8] However, the Code

---

[1] Int. Rev. Code of 1954, § 2056.

[2] Int. Rev. Code of 1939, § 812 (e).

[3] For purposes of this paper, the husband is considered as the decedent and his widow as the surviving spouse. However, the deduction is equally available if the decedent happens to be the wife and the surviving spouse the husband.

[4] Int. Rev. Code of 1954, § 2056 (a).

[5] Int. Rev. Code of 1954, § 2056 (a).

[6] Int. Rev. Code of 1954, § 2056 (c) (1).

[7] Int. Rev. Code of 1954, § 2056 (b) (1).

[8] Int. Rev. Code of 1954, § 2056 (b) (1).

provides an exception to the terminable interest rule under which the power of appointment trust can qualify if certain requirements are met. The exception reads as follows:

> Life estate with power of appointment in surviving spouse. —In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
>
> (A) The interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
>
> (B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.[9]

B. Regulations

The regulations prescribe five conditions which must be satisfied in order to qualify a power of appointment trust for the marital deduction:

> The surviving spouse must be entitled for life to all the income from the interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.[10]
>
> The income payable to the surviving spouse must be payable annually or at more frequent intervals.[11] The surviving spouse

---

[9] INT. REV. CODE OF 1954, § 2056 (b) (5); Int. Rev. Code of 1939, § 812 (e) (1) (F). The Technical Amendments Act of 1958, § 93 (a), 72 Stat. 1668, amended § 812 (e) (1) (F) so as to make it conform to the 1954 code. Basically, the amendment broadened the provisions of the 1939 code so as to include legal as well as equitable life estates, and to permit the decedent to have the option to give to the surviving spouse rights to income and powers of appointment relative to either all the trust property or a specific portion of it.

[10] Treas. Reg. § 20.2056 (b) -5 (a) (1) (1958).

[11] Treas. Reg. § 20.2056 (b) -5 (a) (2) (1958).

must have the power to appoint the entire interest or the specific portion to either herself or her estate.[12]

The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.[13]

The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.[14]

The regulations applicable to each of these conditions are examined below. In addition, the regulations on several other matters are considered.

1. *The Five Basic Conditions*

a. *Surviving Spouse Entitled for Life to All Income from the Entire Interest or a Specific Portion of the Entire Interest.*[15]

This condition is met if under the trust instrument the surviving spouse in effect is given that substantial degree of beneficial enjoyment of the trust property that the law of trusts gives to anyone who is unqualifiedly designated as the life beneficiary of a trust. The requisite degree of enjoyment is attained where the terms of the trust instrument and the surrounding circumstances manifest an intention on the part of the decedent that the trust should produce such income for the surviving spouse for life, or she should have such use of the trust property as is consistent with the value and preservation of the corpus. The trust is considered qualified where the surviving spouse is named as sole life beneficiary of all income from the entire interest or a specific portion of the entire interest, and the terms of the instrument and the surrounding circumstances considered as a whole do not indicate an intention on the part of the decedent to deprive the surviving spouse of the degree of enjoyment required.[16]

If the trust in effect gives to the surviving spouse enforceable rights necessary to preserve her requisite degree of enjoyment, it is immaterial if this effect is reached by express provisions in the instrument, or, in their absence, by the state law pertaining to management of the trust property and the allocation of receipts and expenditures.[17] This is illustrated by the following example:

A provision in the trust instrument for amortization of bond premium by appropriate periodic charges to interest will not

---

[12]Treas. Reg. § 20.2056 (b) -5 (a) (3) (1958).
[13]Treas. Reg. § 20.2056 (b) -5 (a) (4) (1958).
[14]Treas. Reg. § 20.2056 (b) -5 (a) (5) (1958).
[15]Treas. Reg. § 20.2056 (b) -5 (a) (1) (1958).
[16]Treas. Reg. § 20.2056 (b) -5 (f) (1) (1958).
[17]Treas. Reg. § 20.2056 (b) -5 (f) (2) (1958).

> disqualify the interest passing in trust even though there is no State law specifically authorizing amortization, or there is a State law denying amortization which is applicable only in the absence of such a provision in the trust instrument.[18]

The nature of the trust assets and the rules provided for management of the trust may be such that a provision for allocation to income limited to such receipts as rents, interest and ordinary cash dividends will give to the surviving spouse the requisite degree of enjoyment. If this be the case, a further provision that such receipts as stock dividends and proceeds from the sale of trust assets are to become part of corpus will not disqualify the interest so passing. An allocation to income of such items as a depletion charge for assets subject to depletion, depreciation, trustees' commissions and other charges will not disqualify the interest, unless, as a result, the surviving spouse is deprived of the requisite beneficial enjoyment. Provisions in the trust instrument with respect to allocation by the trustee of receipts and expenses between income and corpus must be considered in relation to the "nature and expected productivity of the assets passing in trust, the nature and frequency of occurrence of the expected receipts, and any provisions as to change in the form of investments."[19]

Administrative powers granted to the trustee in the trust instrument, such as the power to determine the allocation of receipts and disbursements between income and corpus, the power to apply income or corpus for the benefit of the surviving spouse, and the power to retain the assets passing to the trust, will not disqualify the interest passing to the surviving spouse, unless these grants of power show an intention to deprive her of the requisite degree of enjoyment. However, if the entire terms of the instrument are such that the courts will impose reasonable limitations upon the exercise of these powers, such an intention will not be found to exist.[20] The following affords an illustration of this provision:

> A power to retain trust assets which consists substantially of productive property will not disqualify the interest if the applicable rules for the administration of the trust require, or permit the spouse to require, that the trustee either make the property productive or convert it within a reasonable time. Nor will such a power disqualify the interest if the applicable rules for administration of the trust require the trustee to use the degree of judgment and care in the exercise of the power which a prudent man would use if he were owner of the trust assets. Further, a power to retain a residence or other property for the personal use of the spouse will not disqualify the interest passing in trust.[21]

---

[18] *Ibid.*

[19] Treas. Reg. § 20.2056 (b) -5 (f) (3) (1958).

[20] Treas. Reg. § 20.2056 (b) -5 (f) (4) (1958).

[21] *Ibid.*

If the primary purpose of the trust is to safeguard property without providing the surviving spouse with the requisite degree of beneficial enjoyment, an interest passing to her under such a trust will fail to qualify. Disqualification will occur if the trust instrument either expressly calls for the accumulation of income, or if it is drawn in such a manner as to indirectly accomplish a similar purpose.[22] For example:

> Assume that the corpus of a trust consists substantially of property which is not likely to be income producing during the life of the surviving spouse and that the spouse cannot compel the trustee to convert or otherwise deal with the property as described in subparagraph (4) of this paragraph. An interest passing to such a trust will not qualify unless the applicable rules for the administration require, or permit the spouse to require, that the trustee provide the required beneficial enjoyment, such as by payments to the spouse out of other assets of the trust.[23]

An interest passing in trust to the surviving spouse will not qualify under the condition that she be entitled to all the income

> to the extent that the income is required to be accumulated in whole or in part or may be accumulated in the discretion of any person other than the surviving spouse;
>
> to the extent that the consent of any person other than the surviving spouse is required as a condition precedent to distribution of the income;
>
> or to the extent that any person other than the surviving spouse has the power to alter the terms of the trust so as to deprive her of her right to income.[24]

However, a provision to the effect that the income shall not be subject to assignment, alienation, pledge, attachment, or assignment of creditors will not disqualify the interest under the condition that the surviving spouse be entitled to all the income.[25]

b. *Income from Property Must Be Payable to Surviving Spouse Annually or at More Frequent Intervals.*[26]

This condition and the term "entitled for life" in the preceding condition[27] are complied with if under the terms of the trust instrument the income is currently or at least annually distributable to the surviving spouse or she is given such command over the net income as to make it virtually hers. Silence of the trust instrument as to the in-

---

[22]Treas. Reg. § 20.2056 (b) -5 (f) (5) (1958).
[23]*Ibid.*
[24]Treas. Reg. § 20.2056 (b) -5 (f) (7) (1958).
[25]*Ibid.*
[26]Treas. Reg. § 20.2056 (b) -5 (a) (2) (1958).
[27]Treas. Reg. § 20.2056 (b) -5 (a) (1) (1958).

terval between payments will not disqualify the interest if under the applicable law distributions of income cannot be made less frequently than annually. If under the trust instrument the surviving spouse is given the right exercisable annually, or more frequently, to require distribution to herself of the trust income, a further provision to the effect that otherwise trust income is to be accumulated and added to corpus will not disqualify the interest under this condition and the term "entitled for life" in the preceding condition.[28] It is sufficient if income accrued for the period between the last distribution date and the date of the surviving spouse's death is subject to her power of appointment over trust corpus.[29]

A provision in the trust instrument to the effect that the spouse is not entitled to income from estate assets before distribution of those assets by the executor will not disqualify the interest under this condition and the term "entitled for life" under the preceding condition,[30] unless the decedent's will authorizes or directs the executor to delay distribution of the estate assets beyond a reasonable period necessary for administration of the decedent's estate.[31]

c. *Surviving Spouse Must Have Power to Appoint the Property or Specific Portion Thereof to Herself or Her Estate.*[32]

This condition and the next succeeding condition[33] are not met unless the surviving spouse's power to appoint the entire interest or a specific portion thereof comes within one of the categories as follows:

> A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade); or[34] a power so to appoint exercisable in favor of her estate. Such a power, if exercisable during life, must be fully exercisable at any time during life, if exercisable by will, must be fully exercisable irrespective of the time of her death (subject in either case to the provisions[35] . . . relating to interests conditioned on survival for a limited period); or[36]
>
> a combination of [these] powers. . . . For example, the surviving spouse may, until she attains the age of 50 years, have a power to appoint to herself and thereafter have a power to appoint to her estate. However, the condition that the spouse's power must be exercisable in all events is not satis-

---

[28] *Ibid.*
[29] Treas. Reg. § 20.2056 (b) -5 (f) (8) (1958).
[30] Treas. Reg. § 20.2056 (b) -5 (a) (1) (1958).
[31] Treas. Reg. § 20.2056 (b) -5 (f) (9) (1958).
[32] Treas. Reg. § 20.2056 (b) -5 (a) (3) (1958).
[33] Treas. Reg. § 20.2056 (b) -5 (a) (4) (1958).
[34] Treas. Reg. § 20.2056 (b) -5 (g) (1) (i) (1958).
[35] Treas. Reg. § 20.2056 (b) -3 (1958).
[36] Treas. Reg. § 20.2056 (b) -5 (g) (I) (ii) (1958).

> fied unless irrespective of when the surviving spouse may die the entire interest or a specific portion of it will at the time of her death be subject to one power or the other (subject to the exception[37] . . . relating to interests contingent on survival for a limited period).[38]

The surviving spouse must be given the power to appoint free of the trust the entire interest or a specific portion of it either as unqualified owner or as a part of her estate. In effect, she must be able to appoint to anyone she pleases. The trust instrument may provide for takers in default of the exercise of the power. Further, the decedent may provide that in the event the power is not exercised, the trust shall continue for a longer period.[39]

d. *Power in Surviving Spouse Must Be Exercisable by Her Alone and in All Events.*[40]

In order for this condition to be met the exercise of the power in the surviving spouse must not require the joinder or consent of any other person. Further, if the power can be terminated during the life of the surviving spouse by any event other than her complete exercise or release of it or if it can be exercised for a limited purpose only, it is not considered exercisable in all events. For example, if the power can not be exercised upon the surviving spouse's remarriage, it is not exercisable in all events. If the terms of the instrument or the applicable local law place any restrictions on the surviving spouse's power to consume property for her benefit, the power is not considered exercisable in all events.[41]

> Thus, if a power of invasion is exercisable only for the spouse's support, and only for her limited use, the power is not exercisable in all events. In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will).[42]

To be exercisable in all events, the power in the surviving spouse must exist immediately after the decedent's death. If the power is exercisable during the surviving spouse's life but cannot be effectively exercised before distribution of the assets by the executor, or if it is

---

[37]Treas. Reg. § 20.2056 (b) -3 (1958).
[38]Treas. Reg. § 20.2056 (b) -5 (g) (1) (iii) (1958).
[39]Treas. Reg. § 20.2056 (b) -5 (g) (2) (1958).
[40]Treas. Reg. § 20.2056 (b) -5 (a) (4) (1958).
[41]Treas. Reg. § 20.2056 (b) -5 (g) (3) (1958).
[42]*Ibid.*

exercisable by will but cannot be effectively exercised in the event the surviving spouse dies before distribution of the assets by the executor, the power in either case is not exercisable in all events. However, it may be provided that in the event the power is exercised during the administration of the estate the distribution of the property to the appointee shall be delayed for the period of administration. Formal limitations on the exercise of the power will not disqualify the interest if the power is in existence at all times following the decedent's death.[43]

> Examples of formal limitations on a power exercisable during life are requirements that an exercise must be in a particular form, that it must be filed with a trustee during the spouse's life, that reasonable notice must be given, or that reasonable intervals must elapse between successive partial exercises.[44]
>
> Examples of formal limitations on a power exercisable by a will are that it must be exercised by a will executed by the surviving spouse after the decedent's death or that exercise must be by specific reference to the power.[45]

If the surviving spouse is given the requisite power to appoint herself or her estate, she may be given in addition one or more lesser powers. For example, if she is given the requisite testamentary power to appoint to her estate, she may be given also a limited power of withdrawal or of appointment during life.[46]

e. *Entire Interest or Specific Portion Must Not Be Subject to Power in Any Other Person to Appoint Any Part to Any Other Person Than Surviving Spouse.*[47]

If the decedent created a power in the trustee or in any other person to appoint any part of the interest to any person other than the surviving spouse, then to that extent the interest passing to the surviving spouse is nondeductible. If, however, the power in the other person is not in opposition to the power of the surviving spouse, none of the interest passing to the surviving spouse will be disqualified under this condition. The trustee may be given a power to distribute corpus to or for the benefit of the surviving spouse without disqualifying the trust. If the surviving spouse is legally obligated to support minor children, a power in the trustee to distribute corpus to the spouse for the support of such children will not disqualify the trust.[48] The following example gives an illustration of the application of this paragraph:

---

[43]Treas. Reg. § 20.2056 (b) -5 (g) (4) (1958).

[44]*Ibid.*

[45]*Ibid.*

[46]Treas. Reg. § 20.2056 (b) -5 (g) (5) (1958).

[47]Treas. Reg. § 20.2056 (b) -5 (a) (5) (1958).

[48]Treas. Reg. § 20.2056 (b) -5 (j) (1958).

> Assume that the decedent created a trust, designating his surviving spouse as income beneficiary for life and as donee of a power to appoint by will the entire corpus. The decedent further provided that the trust could distribute 30 percent of the corpus to the decedent's son when he reached the age of 35 years. Since the trustee has a power to appoint 30 percent of the entire interest for the benefit of a person other than the surviving spouse, only 70 percent of the interest placed in trust satisfied [this condition]. If in this case, the surviving spouse had a power, exercisable by her will, to appoint only one-half of the corpus as it was constituted at the time of her death, it should be noted that only 35 percent of the interest placed in the trust would satisfy the condition[49] [that the surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate].[50]

2. *Amount of Deduction As to A Specific Portion*[51]

The rights of the surviving spouse as to income and her power of appointment must co-exist as to the same interest in property. However, it is not necessary that the rights to income and the power of appointment be in the same proportion. Assuming that the conditions[52] as to income and power to appoint are met, if the share of the property interest to which the rights to income apply is not the same as the share subject to the power of appointment, the deduction will be limited to the smaller. If the share over which the power of appointment applies is smaller than the share from which the right to income is applicable, the deduction will be limited to the share applicable to the power of appointment.[53]

3. *Definition of A Specific Portion*[54]

In order for a partial interest in property to be treated as a specific portion of the entire interest, the surviving spouse's rights to income and power to appoint must constitute a fractional or percentile share of a property interest so that such interest in the surviving spouse will reflect its proportionate share in the increment or decline in the whole of the property. Therefore, if the surviving spouse is given rights to income only in terms of a specific sum annually, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not deductible. However, even though the rights of the surviving spouse

---

[50]Treas. Reg. § 20.2056 (b) -5 (j) (1958).
[49]Treas. Reg. § 20.2056 (b) -5 (a) (3) (1958).
[51]Treas. Reg. § 20.2056 (b) -5 (b) (1958).
[52]Treas. Reg. § 20.2056 (b) -5 (a) (1958).
[53]Treas. Reg. § 20.2056 (b) -5 (b) (1958).
[54]Treas. Reg. § 20.2056 (b) -5 (c) (1958).

are not expressed in terms of a definite fraction or percentage, the deduction may be allowed, if the effect of local law gives to her such rights as she would have had if the size of the share had been expressed in terms of a definite fraction or percentage.[55]

4. *Definition of An Entire Interest*[56]

In determining whether the surviving spouse's rights extend to an entire interest or a specific portion of an entire interest, each property interest is considered separately. For example:

> The decedent bequeathed $250,000 to C, as trustee. C is to invest the money and pay all of the income from the investments to W, the decedent's surviving spouse, annually. W was given a general power, exercisable by will, to appoint one-half of the corpus of the trust. Here, immediately following distribution by the executor, the $250,000 will be sufficiently segregated to permit its identification as a separate item, and the $250,000 will constitute an entire property interest. Therefore, W has a right to income and a power of appointment such that one-half of the entire interest is a deductible interest.[57]

5. *Trust Created During Decedent's Life*[58]

In case the trust is created during the decedent's life, it is immaterial whether the interest passing to the surviving spouse satisfies the income and power of appointment conditions[59] prior to the decedent's death.

If the surviving spouse is entitled to the income until the trust terminates, or if she has the right, exercisable in all events, to have the corpus distributed to her at any time during her life, even though the trust may be terminated during her life under her exercise of a power of appointment or by distribution of corpus to her, the interest passing in trust will satisfy the condition[60] that the spouse be entitled to all the income.[61]

6. *Application of Local Law*[62]

In determining whether the income and power of appointment

---

[55] *Ibid.*

[56] Treas. Reg. § 20.2056 (b) -5 (d) (1958).

[57] *Ibid.*

[58] Treas. Reg. § 20.2056 (b) -5 (f) (6) (1958).

[59] Treas. Reg. § 20.2056 (b) -5 (a) (1958).

[60] Treas. Reg. § 20.2056 (b) -5 (a) (1) (1958).

[61] Treas. Reg. § 20.2056 (b) -5 (f) (6) (1958).

[62] Treas. Reg. § 20.2056 (b) -5 (e) (1958).

conditions[63] are satisfied by the trust instrument, the applicable provisions of local law governing the administration of the trust govern.[64]

7. *Requirement of Survival for a Limited Period*[65]

The trust instrument may provide that the surviving spouse's power of appointment will terminate in the event her death occurs within a period not exceeding six months after the decedent's death or in the event her death occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse. If these are the only conditions which would cause the termination of the power, and they in fact do not occur, then the entire interest or a specific portion of it passing to the surviving spouse will not fail to satisfy the condition[66] that the surviving spouse must have the power to appoint to herself or to her estate.[67]

C. Cases

There appears to have been very little litigation[68] on the question of whether the surviving spouse has been given the requisite rights to income. In one of the few cases on this point, *Estate of Allen J. Weisberger*,[69] decided in 1957, under the 1939 Code, in his will the decedent created a trust over which his widow received an unlimited testamentary power of appointment. She was entitled to all the income for life, subject, however, to the right of the trustee to divert to the decedent's sons so much of the income from the trust as would be necessary, together with other income available to the sons, to provide for their maintenance and education. Circumstances at the time of the decedent's death made it very unlikely that the sons would ever require any of the income from the trust. In denying the marital deduction for the trust, the court found that the widow was not entitled for life to all the income from the trust. It said that no matter how remote the uncertainty may be that the widow will receive all the income, such uncertainty is fatal to the taxpayer's position.

It seems to be fairly well recognized by the courts that an unlimited

---

[63]Treas. Reg. § 20.2056 (b) -5 (a) (1958).

[64]Treas. Reg. § 20.2056 (b) -5 (e) (1958).

[65]Treas. Reg. § 20.2056 (b) -5 (h) (1958).

[66]Treas. Reg. § 20.2056 (b) -5 (a) (3) (1958).

[67]Treas. Reg. § 20.2056 (b) -5 (h) (1958).

[68]As of the date of this paper, a large percentage of the cases in this area concern those litigated under the 1939 code before and after the Technical Amendments Act of 1958. See note 9 *supra*. In selecting certain of these cases under the 1939 code, the author has endeavored to present those that appear to be of some value in considering the qualification of the power of appointment trust under the 1954 code.

[69]29 T.C. 217 (1957).

power to invade satisfies the condition that the surviving spouse must have a power to appoint to herself or to her estate.[70] There is disagreement, however, on when such an unlimited power exists. This is particularly true where, in addition to the power of invasion in the surviving spouse, the decedent provides for remainders over as to any unexpended portion of the property existing at the surviving spouse's death. In the case of *Estate of Pipe v. Commissioner*,[71] decided in 1957 under the 1939 Code, the decedent bequeathed the residue of his estate to his wife with full power to use, sell, enjoy, or dispose of the income and principal in her uncontrolled discretion, except that she was to have no power to dispose of any unexpended part remaining at her death. Any portion remaining at her death was to go over to others. The court disallowed the deduction. It took the position that the widow's power to consume was not an unlimited power to invade inasmuch as she was prohibited from appointing any unexpended portion remaining at her death. The case of *Estate of Semmes v. Commissioner*[72] was decided in 1961 under the 1954 Code. There the decedent named his widow as trustee and life income beneficiary of stock bequeathed in trust. At the widow's death the trust property was to be divided among their children. The widow was given the right to encroach upon corpus for her sole benefit at any time she saw fit. The court denied the deduction. It found that the widow could not dispose of the property in question by gift or by appointing the corpus to herself as unaqualified owner. In reaching this conclusion, the court noted the expressed manifestations by the decedent in his will to the effect that the widow could do as she pleased with the property only if she survived the children and their issue.

The deduction was allowed in the case of Lincoln *Rochester Trust Co. v. United States*,[73] decided in 1960 under the 1939 Code. The decedent bequeathed to his wife the life use of the residue of his estate plus the right to use any part of the principal thereof. The will further provided for remainders over with respect to any portion of the residue remaining at the death of the widow. The court found that she had been given a broad power to invade which was the equivalent of a general power of appointment exercisable by will. The court noted that the surviving spouse in the *Pipe* case, just as in the principal case,

---

[70] *But see* Estate of May v. Commissioner, 283 F.2d 853 (2d Cir. 1960), *cert. denied*, 366 U.S. 903 (1961).

[71] 241 F.2d 210 (2d Cir. 1957), *cert. denied*, 355 U.S. 814 (1957). See also Estate of Tarver v. Commissioner, 255 F.2d 913 (4th Cir. 1958). Compare Rev. Rul. 55-394, 1955-1 CUM. BULL. 458.

[72] 288 F.2d 664 (6th Cir. 1961).

[73] 188 F. Supp. 839 (W.D. N.Y. 1960). See also Boyd v. Gray, 175 F. Supp. 57 (D. Ky. 1959); Estate of Leo A. Bourke, 29 P-H Tax Ct. Mem. 557 (1960).

[74] 2 Am. Fed. Tax R.2d 6352 (W.D. Okla. 1958).

was not given the power to make testamentary disposition of any part of the property remaining unexpended at her death, but it did not consider the former case, from another circuit, controlling. In the case of *Newton v. Wiseman*,[74] decided in 1958 under the 1939 Code, the decedent bequeathed stock in equal shares in trust to his widow and nephew. The will further provided that upon the widow's death, her share of the stock would become vested in the nephew if she died without disposing of it by sale during her lifetime. The deduction was allowed for the widow's share of the stock. The court found that she could dispose of it, that the use of the proceeds was not limited in any way during her life, and that she could make testamentary disposition of the proceeds. The *Pipe* case, was distinguished on grounds that there the widow could not completely dispose of the property because any portion remaining at her death that could be identified as a part of the husband's estate was to go to the remainderman. Further, since the court had never decided the question in point, it did not feel bound by the decision in the *Pipe* case. In the case of *Hoffman v. McGinnes*,[75] decided in 1960 under the 1954 Code, the deduction was allowed. There the decedent created a testamentary trust in which his widow was made an income beneficiary for life. The will provided that she had the right to use and spend any or all of the property in trust if she should so desire, and upon her request the trustees were to pay her any part of the property in trust that she might desire, terminating the trust as to any portion so paid her. Any balance remaining in trust at the death of the widow was to be paid to named remaindermen. The court found that the widow possessed an unlimited power to invade and stated that "it would be difficult, if not impossible, to state any more explicitly an intent to confer an unrestricted power exercisable at any time during her life to use all or any part of the principal of the decedent's trust estate." In distinguishing this case from another[76] where the surviving spouse's interest did not qualify, the court stressed the fact that in the latter withdrawals from corpus were limited to amounts required, whereas, in the principal case there was an unlimited power of withdrawal since the widow could expend from corpus any amount desired. The court paid particular attention to the clause in the will which provided that the trust should cease as to any part of the trust property paid to the widow. It was of the opinion that this provision cut off any possible rights the remaindermen would have had otherwise under local law as to that part of the trust property.

In *Estate of Morton H. Spero*,[77] decided in 1960 under the 1939

---

[75]277 F.2d 598 (3d Cir. 1960).

[76]Commissioner v. Ellis, 252 F.2d 109 (3d Cir. 1958).

[77]34 T.C. 1116 (1960). See also Estate of Raymond P. Wheeler, 26 T.C. 466 (1956); Estate of Harry Gelb, 29 P-H Tax Ct. Mem. 1100 (1960).

Code, the decedent created a testamentary trust and made his widow the life beneficiary of all the income. The widow and a bank were named joint trustees. The will provided that the trustees were authorized to use so much of the corpus as might be necessary, in their discretion, to provide for the reasonable needs and comfortable support of the widow and any of the children in the event the income from the trust was insufficient, in their discretion, to provide for their maintenance and support. At the widow's death the trustees were directed to dispose of the then remaining corpus as she by will or otherwise might appoint. In denying the deduction, the court found that the surviving spouse's power to appoint was limited to that part of corpus remaining after any invasion by the trustees. It was felt that this limitation prohibited her from exercising the power alone and in all events.

The main issue in the case of *Estate of Noble*,[78] decided in 1959 under the 1939 Code, was whether a power in the surviving spouse to invade corpus only for her comfort, maintenance and support was sufficient to qualify the interest passing to her for the deduction. The decedent created a testamentary trust and gave the income to his widow for life. The will provided that should she, in her discretion, deem it necessary to use any of the corpus for her maintenance, comfort, and support, the trustee should pay over to her so much as she might direct. The deduction was not allowed. The court determined that she had not been given an unlimited power to invade.

In the case of *Starrett v. Commissioner,* decided in 1955 under the 1939 Code, in his will the decedent left certain property in trust for his wife and also gave her the power to demand corpus. It was further provided that her power to demand corpus or income should terminate in the event of her legal incapacity or the appointment of a guardian or other custodian. The court disallowed the deduction on grounds that the power was not exercisable alone and in all events.

The importance of state law is very aptly illustrated by the case of *Estate of William C. Allen*[80] decided in 1957 under the 1939 Code. The decedent created a trust and made his widow the life income beneficiary. Upon the death of the widow, the trust was to terminate and the trustees were then authorized to distribute the corpus to such persons as the widow by will should appoint. The deduction was not allowed. The court found that under local law the widow did not possess the requisite power to appoint to herself and her estate since no express language to that effect was contained in the decedent's will.

---

[78] 31 T.C. 888 (1959).

[79] 223 F.2d 163 (1st Cir. 1955). Compare Rev. Rul. 55-518, 1955-2 CUM. BULL. 384.

[80] 29 T.C. 465 (1957). See also National Bank of Commerce v. United States, 1 Am. Fed. Tax R.2d 2155 (E.D. Va. 1958); Estate of Dake v. United States, 1961 P-H Fed. Tax Serv. ¶ 145, 711.

IV. Conclusion

The underlying cause of the amount of litigation in this field seems to be due chiefly to an unwillingness on the part of the decedent to allow his surviving spouse to determine the disposition of a portion of his property.

The requirement that the wife be given the requisite rights to income apparently has produced no serious obstacles as indicated by the lack of litigation on this point. Also, in the large majority of cases where the point in issue concerns the requisite power of appointment there is uniformly present a provision in the trust instrument expressly making the surviving spouse a life income beneficiary. It is submitted that such an express provision is the safest approach to the right to income requirement.

As stated above, the primary reason for failure of the interest to qualify for the deduction has been the reluctance of the decedent to give to his widow the requisite power of appointment. The courts generally agree that an unlimited power to invade satisfies this requirement. However, where the decedent has given the surviving spouse the power to invade and also has provided for remainders over at her death as to any unexpended portion of the property, the courts are not in agreement as to the allowance of the deduction. Where such a factual situation has resulted in a disallowance of the deduction, the courts have frequently based their decisions on the grounds that it was the intention of the decedent, as ascertained from the trust instrument and the surrounding circumstances, that some portion of the trust property, for which the deduction is sought, be kept intact for the remainderman. In other instances courts have relied on restrictions imposed by local law on the surviving spouse operating in favor of the remainderman. It is submitted that in the event the decedent desires to give the surviving spouse a power of invasion, the interest is less likely to be disqualified if in addition she is given a general power to appoint by deed or by will. Further, the disposition of any portion of the property remaining at her death would probably encounter less opposition in the courts if it provided for specific takers in default of the exercise of the power and not by way of remainders over.

If the surviving spouse's power over corpus is expressed only in terms of a power of invasion, it should be unlimited as to all of the corpus or a specific portion of it, as the case may be. The courts generally do not uphold the deduction where the power to invade is limited by some standard such as the comfort, support, and maintenance of the surviving spouse. Also, regardless of whether the power of the surviving spouse is expressed in terms of a power to appoint either by will or by deed or in terms of a power of invasion, such power should not be

limited by granting to another person a power over the trust property which is in opposition to that of the surviving spouse.

Finally, the marital deduction is usually of extreme importance in many estate plans largely because of the amount of the deduction available in relation to the size of the decedent's estate. It is reasonable to assume that very often the estate plan is built around the marital deduction. If this be the case in a particular situation, it would seem that every effort should be made to insure the qualification of the interest passing to the surviving spouse for the deduction, otherwise the plan conceivably could be virtually worthless. It is true that frequently the proper approach to take is difficult to determine in view of the applicability of local law and the lack of unanimity of opinion among the courts. However, it is the opinion of the author that the course wrought with the least danger is one where the pertinent provisions in the trust instrument are phrased in the words of the statute and the inclusion of restrictions on the surviving spouse are held to a minimum or, if possible, excluded altogether. Therefore, it is submitted that after all matters related to the estate plan are considered and it is still feasible to do so, the trust instrument can best insure the deduction by expressly providing that the surviving spouse is to receive all the income for life from the property passing in trust or from a specific portion thereof, and that she is to have a power freely exercisable by her alone and in all events to appoint either by deed or by will to herself or to her estate or to any other person she may desire all the trust property or a specific portion thereof. Any deviation from this seemingly broad grant to the surviving spouse should be made only after the regulations, applicable by local law, and the cases in point have been examined thoroughly.

Justin L. Cox

RECENT DECISIONS

Bankruptcy—Collection of Tax Penalties Which Are Secured by Pre-Bankruptcy Liens

Plaintiff, a discharged bankrupt, filed a complaint with the referee in bankruptcy to enjoin the United States and the District Director of Internal Revenue from collecting tax penalties which were secured by a pre-bankruptcy lien. Referee dismissed the complaint and plaintiff petitioned the district court for review. Held: Affirmed. Such penalties are not allowable in bankruptcy, and therefore the duty to pay these penalties was not affected by a discharge, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalties arose, with reasonable and actual cost occasioned thereby and interest. *Steckler v. United States,* 195 F. Supp. 879 (S.D. Ind. 1961).

The principal purpose of the Bankruptcy Act is to accomplish an equitable distribution of the assets of the estate of the bankrupt among creditors. The courts are in general agreement that creditors should only be permitted to share in the estate to the extent to which they contributed to the bankrupt before bankruptcy.[1] Since tax penalties cannot be classified as something which the creditor has contributed to the bankrupt, the Bankruptcy Act specifically prohibits the allowance of tax penalties in bankruptcy.[2] The courts have generally concurred that tax penalties which are unsecured are not allowable in bankruptcy,[3] but in considering penalties based on secured claims there is an existing conflict. The Sixth,[4] Ninth,[5] and Tenth[6] Circuits have held that tax penalties are allowable to the extent that they are covered by valid pre-bankruptcy liens, section 57j of the Bankruptcy Act[7] notwithstanding. The Fourth[8] and Fifth[9] Circuits have denied the allowance of such penalties despite the existence of pre-bankruptcy liens and have concluded that these penalties survive a discharge in bankruptcy. Those circuits which allow tax penalties in bankruptcy base their conclusion on the contention that the Bankruptcy Act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested in him.[10] On the other hand, the circuits which prohibit the allowance of tax penalties in bankruptcy base their decisions on the pertinent section of the Bankruptcy Act[11] and on the argument that the imposition of a penalty on a bankrupt estate is not punishment of the bankrupt but is instead punishment of other creditors.[12]

---

[10]*In re* Knox-Powell-Stockton Co., 100 F.2d 979, 982 (9th Cir. 1939).

[1]*In re* Parchem, 166 F. Supp. 782 (D. Minn. 1958).

[2]30 Stat. 561 (1898), 11 U.S.C. § 93 (j) (1958).

[3]77 Annot., A.L.R. 2d 1126.

[4]Kentucky *ex rel.* Unemployment Compensation Comm'n v. Farmers Bank & Trust Co., 139 F.2d 266 (6th Cir. 1943).

[5]*In re* Knox-Powell-Stockton Co., 100 F.2d 979 (9th Cir. 1939).

[6]United States v. Mighell, 273 F.2d 682 (10th Cir. 1959).

[7]30 Stat. 561 (1898), 11 U.S.C. § 93 (j) (1958).

[8]United States v. Harrington, 269 F.2d 719 (4th Cir. 1959).

[9]United States v. Phillips, 267 F.2d 374 (5th Cir. 1959).

[11]30 Stat. 561 (1898), 11 U.S.C. § 93 (j) (1958).

[12]*In re* Burch, 89 F. Supp. 249 (D. Kan. 1948).

The plaintiff in the noted case was faced with two formidable tasks in order to succeed in this action. First, he had to show that he was entitled to bring the action even though such suits for injunctive relief from the payment of tax penalties are prohibited by statute[13] and are considered in the same category as suits for relief from the payment of taxes.[14] To be permitted to bring this action the plaintiff had to prove that the tax penalties were illegal and that special and extraordinary circumstances were present to invoke equity,[15] a requirement which the taxpayer failed to meet. Secondly, the plaintiff had to prove that section 57j was inapplicable. Plaintiff argued that the penalty, being a "judgment" in its broad sense, was a provable debt under section 63a (1)[16] and was discharged under section 17[17] which provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, with certain exceptions which do not apply here.[18] However, the court rejected such argument, applied section 57j, and, by relying on other authority,[19] reasoned that penalties and forfeitures were limited as to their provability to the amount of the pecuniary loss sustained by the transaction or proceeding out of which the penalty arose and therefore were not affected by a discharge.

It is submitted that the court reached the proper result in the noted case based on section 57j of the Bankruptcy Act. This section makes no distinction between penalties on secured or unsecured claims, but holds that all shall be disallowed in bankruptcy except for the amount of pecuniary loss sustained. To permit the bankrupt to have these penalties allowed in bankruptcy would contravene public policy by granting the delinquent taxpayer a release from his wrongful act at the expense of the creditors. It is evident from the disagreement between the circuits on this issue that there is a need for clarification by the Supreme Court. It is further evident that if the rule is applied to permit recovery of tax penalties by the creditor after discharge, it must be just as conscientiously applied in preventing the collection of such penalties in bankruptcy hidden under the cloak of allowable interest.[20] Otherwise an equitable distribution of the assets of the bankrupt's estate among creditors, to the extent which they have contributed to the bankrupt before bankruptcy, will be prevented.†

Lloyd G. Spivey, Jr.

Constitutional Law—The "Home Port" Doctrine Applied to International Air Commerce

Plaintiff, the owner and operator of foreign owned and based aircraft flown exclusively in foreign commerce, obtained in the lower court

---

[13] Int. Rev. Code of 1954, § 7421 (a).

[14] See Reams v. Vrooman-Fehn Printing Co., 140 F.2d 237, 241 (6th Cir. 1944).

[15] National Foundry Co. v. Director, 229 F.2d 149 (2d Cir. 1956).

[16] 30 Stat. 544 (1898), 11 U.S.C. § 103a (1) (1958).

[17] 30 Stat. 544 (1898), 11 U.S.C. § 35 (1958).

[18] *In re* Abramson, 210 Fed. 878, 879 (2d Cir. 1914).

[19] 1 Collier, Bankruptcy § 17.03 (14th ed. 1959).

[20] *Id.* at § 17.13.

†Editor's note: Since this case was decided, the Supreme Court has ruled on this problem in Simonson v. Grandquist, 82 Sup. Ct. 537 (1962). The holding is in accord with the suggestion of the author of the note.

a refund of personal property taxes levied against its aircraft on an apportioned basis by the City and County of Los Angeles. HELD: Affirmed. Since there is no relevant distinction between aircraft flying the international skies and oceangoing vessels plying the international seas, the former should be subjected to the same "home-port" doctrine of taxation which the United States Supreme Court has applied to the latter. *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 14 Cal. Rptr. 25 (1961)

In the absence of congressional provision for a uniform system of taxation, the power of states to tax carriers operating in interstate commerce is, in certain areas, equal to that of the Federal Government.[1] In early cases involving state taxation of vessels the Supreme Court adopted the "home-port" doctrine: only the corporate domicile of the vessel owner could levy a property tax on the vessel, thereby insuring a tax on the full value of the property while avoiding multiple taxation.[2] The earlier Supreme Court decisions dealing with the "home-port" doctrine seem to be based on the commerce clause;[3] the later decisions[4] are predicated upon the due process clause of the fourteenth amendment. In later decisions[5] the Court, in determining the validity of a tax in light of this doctrine, has held the question to involve both the commerce and due process clauses and has failed to indicate clearly on which the decision was predicated.[6] There would seem to be, however, substantial agreement that the proscription on multiple taxation arises from the commerce clause,[7] while the due process inquiry is whether the property has acquired sufficient "situs" in the taxing jurisdiction to render it fair to levy a tax in return for "opportunities, benefits, or protection conferred or afforded by the taxing state."[8]

The "home-port" doctrine, however, denies tax revenues to nondomiciliary states which also extend benefits and protection to the carrier. Therefore, in early railroad cases, the Supreme Court adopted a rule of apportionment.[9] Under the apportionment concept, the nondomiciliary state may tax a percentage of the value of the transient personal property as computed by a formula relating the tax, under due process principles,[10] to the use of property within the state.[11] Where the taxing state is also the domiciliary of the taxpayer, multiple taxation may be avoided by requiring the state to reduce its tax by the

---

[1]Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299 (1851).

[2]See Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1855).

[3]See, *ibid.*

[4]See, *e.g.*, St. Louis v. The Ferry Co., 78 U.S. (11 Wall.) 423, 430-31 (1870).

[5]*E.g.*, Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

[6]See State Taxation of International Air Transportation, 11 STAN. L. REV. 518, at 520-21 (1959).

[7]See, *e.g.*, Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590, 598 (1954) (dictum).

[8]*Id.* at 600, quoting Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949).

[9]See, *e.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[10]See Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590, 598-99 (1954).

[11]See, *e.g.*, Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900).

amount which other states can constitutionally levy.[12] The Supreme Court has recently extended the apportionment principle to vessels operating on inland waters,[13] and to interstate aircraft.[14] The Court has not, however, indicated whether the apportionment principle should be applied where the owner of the aircraft is domiciled in a foreign country rather than in another state, or where the aircraft operate in foreign rather than in interstate commerce.

The most feasible solution to the problem of the liability of international aircraft for state property taxes seems to have been reached by the Supreme Court of California in its decision in the instant case. Since existing decisions do not define the constitutional limits of the states' power to tax international air transportation, the most practical answer appears to be the adoption of the "home-port" principle. The states are without power to negotiate treaties with foreign countries, and since the Federal Government has been reluctant to preclude state taxation of foreign owned property, retaliatory taxation against all United States-flag aircraft is a foreign government's only recourse.[15] State action, having the effect of arousing foreign hostility, has been prohibited by the Court in past decisions.[16] The "home-port" doctrine is therefore not only the most acceptable constitutionally, but also the most practical in preventing foreign hostility toward the United States and in encouraging the growth of international air commerce.

Paul Tudor Jones, V

Constitutional Law—The Practice of Religious Ritual in Public Schools

The board members of a public school district in Nassau County, New York, gave instructions to its teaching staff that at the commencement of each school day the act of allegiance to the flag should be followed with a prayer which recognized dependence upon God and invoked His blessings upon the students, their parents, teachers, and country. The instructions of the board provided that no child was to be required or encouraged to join in the prayer against his wish. Parents of children attending school in the district brought action to prevent the board from continuing the practice, asserting that the prayer was unlawful because of the prohibitions of the establishment of religion clause of the first amendment of the United States Constitution as made applicable to the states by the fourteenth amendment. The New York Supreme Court, Appellate Division, upheld the order of the school board and the petitioner appealed. Held: Affirmed. The daily recitation of the "Regents prayer" in the public schools does not violate the constitutional guarantees of freedom of religion because of its noncompulsory nature. *Engel v. Vitale,* 176 N.E.2d 579 (N.Y. 1961).

---

[12]See New York *ex rel.* New York C. & H.R.R.R. v. Miller, 202 U.S. 584 (1906).

[13]Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

[14]*Compare* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590 (1954) *with* Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

[15]See State Taxation of International Air Transportation, 11 Stan L. Rev. 518, 538-39 (1959).

[16]See, *e.g.*, The Chinese Exclusion Case, 130 U.S. 581, 605-09 (1889) (dictum).

The development of the precise meaning of the establishment and freedom of religion clauses of the first amendment has had a long and interesting history. In 1947 the United States Supreme Court said that in modern times the clauses mean at least that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[1] Since the beginnings of this nation the dominant religious group in the community has usually pressed for the inclusion of some form of worship and/or education in the school system.[2] Because most of these projects have expressed the will of the great majority of the citizens of the school districts, relatively few actions have been commenced to restrain or limit these programs. When religious instruction in the public schools has been challenged, historically it has been attacked on two grounds. First, the offering of religious instruction in public schools is the giving by the state of something of value to the religious groups, *i.e.,* the tax-supported school facilities for use in religious instruction.[3] Secondly, since compulsory school attendance laws are usually involved, a certain degree of compulsion can be said to exist in requiring the students by law to gather at the site of the religious instruction.[4]

In 1948 the Supreme Court declared unconstitutional a program in the Illinois public schools which called for religious instruction of the students by church paid instructors at the school buildings during school hours.[5] Illinois had a compulsory school attendance law, but the religious instruction was only for those students who desired to attend. Study halls were held for students who did not attend. The Court said this program, beyond all question, used the public school system to aid religious groups to spread their faith. Four years later, in what some considered a retreat from that case, the Court approved a program in New York which permitted the release of public school students during class hours for religious instruction off the school grounds, provided all costs were paid by the interested religious organizations and each child attending the instruction first obtained written parental approval.[6] There were several strong dissents, however, which maintained that coercion was also present in the case because the state compelled each student to yield a large part of his time for public secular education and then released a portion of it back to him on condition that he devote it to religious purposes.[7]

Upon examination of the noted case, it seems that the same two elements which historically have caused the Court to invalidate programs containing either government facilities used in religious instruction or compulsion exerted upon the students[8] are present in the

---

[7]*Id.* at 323 (dissenting opinion).

[1]Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[2]See Sullivan, *Religious Education in the Schools,* 14 LAW & CONTEMPORARY PROBLEMS 49 (1949).

[3]*E.g.,* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

[4]*Ibid.*

[5]*Ibid.*

[6]Zorach v. Clauson, 343 U.S. 306 (1952).

[8]*E.g.,* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

order of the school board in the noted case. The majority takes the position that since the recitation of the prayer is a voluntary act, no compulsion exists.[9] However, the Supreme Court has previously declared that when a child is compelled by state law to attend a school where other children participate in a voluntary public religious ritual in which he does not join, it sets him apart as a dissenter, which is humiliating to him. Because of a child's inherent desire to conform, the state thereby exerts pressure upon him and hence exposes him to a subtle denial of his religious freedom.[10] The majority in the noted case also held the recitation of the prayer not to be a practice or establishment of religion because the framers of the first amendment were not attempting to prohibit the professing of a general belief in God.[11] But as Mr. Justice Frankfurter phrased it, "Separation means separation, not something less."[12] Historically the inculcation of religion has been a matter for the family and church, and it has been deemed best for both the government and the church to keep the wall between them high and impregnable.[13] However salutary the underlying purpose of a requirement such as the Regents prayer might be, it nonetheless gives direct supervision and influence to the state which seems to overstep the line dividing church and state and cannot help but lead to a gradual erosion of the wall between the two which has been erected by the first amendment.[14]

Neal Biggers, Jr.

Implied Warranty—Liability of Hospital for Injury or Death Resulting from Blood Transfusion—Applicability to Mississippi Law

Action based on theory of implied warranty by administrator of estate against hospital for death of paying patient proximately caused by transfusion of incompatible blood sold to patient by hospital. Patient's statement of account read as follows: "Services . . . Description . . . transfusions $200 . . . less replacements $_____."[1] Plaintiff alleged negligence provable as such, *res ipsa loquitur*, and breach of implied warranty raised by sale of the blood; however, upon proof by defendant of use of due care, plaintiff abandoned both negligence theories and relied on breach of implied warranty of fitness for intended use. The trial court dismissed the complaint. Held: Affirmed. Hospital makes no implied warranty of fitness for intended use of blood furnished to paying patient for transfusion, even though hospital charges patient for same as a separate item. *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital*, 364 P.2d 1085 (Utah 1961).

---

[9]Engel v. Vitale, 176 N.E.2d 579 (N.Y. 1961).

[10]*E.g.*, Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

[11]Engel v. Vitale, 176 N.E.2d 579 (N.Y. 1961).

[12]Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 231 (1948) (concurring opinion).

[13]Everson v. Board of Education, 330 U.S. 1, 18 (1947).

[14]Engle v. Vitale, 176 N.E.2d 579, 588 (N.Y. 1961) (dissenting opinion).

[1]Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital, 364 P.2d 1085, 1086 (Utah 1961).

In blood transfusion damage cases, one of two factual situations is usually involved. Frequently injury is caused by transfusion of an incompatible blood type, as in the noted case. Under such circumstances negligence of a laboratory technician in typing and labeling the blood of both donor and patient is often the issue litigated.[2] Two theories of liability have been espoused in the "incompatible blood" cases, *viz.*, negligence, often including *res ipsa loquitur*, or implied warranty based on a sale of blood.[3] When negligence is alleged, the question of a hospital's immunity from liability for torts of its employees is raised. The modern trend is toward allowing hospital liability for negligent acts of employees, including laboratory technicians;[4] recovery on this theory has been allowed in the incompatible blood cases.[5] In other instances injury results from injection of blood contaminated by the virus of serum jaundice or serum hepatitis. In such situations negligence is not an issue because detection of the viruses in the donor's blood prior to transfusion is to date medically impossible;[6] implied warranty is the only possible theory of recovery.[7] However, no recovery under any theory has been allowed to date in this kind of case.[8]

In implied warranty litigation the theory is that the implied warranty is raised by a sale of the blood by the hospital which places hospital and patient in privity of contract as to the blood sold.[9] Thus far, the noted case is the fourth reported case specifically raising an issue of implied warranty on blood furnished to a patient by a hospital. In the three cases prior to the instant case, a technical sale has been held to be a *sine qua non* to an implied warranty, and for lack of such sale recovery has been denied in each case,[10] not, however, without strong dissent in the case of the first impression.[11] The court's reasoning in holding that the hospital's furnishing of blood to the patient at a price was not a sale was based on an analogy to contracts for work, labor, and services.[12] The conclusion reached was that furnishing of blood by the hospital was merely an incident of the general service contract between hospital and patient and hence was not a sale giving rise to

---

[2]*E.g.*, Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), 25 A.L.R.2d (1952).

[3]See Annot., 59 A.L.R.2d 773 (1958).

[4]*E.g.*, Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W.2d 1 (1960). See generally Annot., 25 A.L.R.2d 29 (1952). *Contra*, Helton v. Sisters of Mercy of St. Joseph's Hospital, 351 S.W.2d 129 (Ark. 1961).

[5]*E.g.*, Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), 25 A.L.R.2d 12 (1952).

[6]*E.g.*, Merk & Co. v. Kidd, 242 F.2d 592 (6th Cir. 1957).

[7]See Annot., 59 A.L.R.2d 780 (1958); see generally *id.* at 768.

[8]*Id.* at 780-83.

[9]See, *e.g.*, Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954).

[10]Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954); Hidy v. State, 207 Misc. 207, 137 N.Y.S.2d 334 (Ct. Cl. 1955); Gile v. Kennewick Public Hospital District, 48 Wash.2d 744, 296 P.2d 662 (1956).

[11]Perlmutter v. Beth David Hospital, 308 N.Y. 100, 108, 123 N.E.2d 792, 796 (1954).

[12]*E.g.*, Babcock v. Nudelman, 367 Ill. 626, 12 N.E.2d 635 (1937); Racklin-Fagin Constr. Corp. v. Villar, 156 Misc. 220, 281 N.Y. Supp. 426 (Sup. Ct. 1935).

an implied warranty.[13] However, a closely analogous and well-reasoned case has recently been decided, holding that notwithstanding the presence or absence of a technical sale to the user, an implied warranty of fitness was made by the manufacturer of Salk polio vaccine.[14]

As the dissent in the case of first impression explains, "It should be noted that plaintiff is not suing defendant for the service of injecting the blood into her bloodstream, but simply for the *sale* of 'bad blood' for a separate valuable consideration . . . ."[15] There is also a clear analogy between a hospital's furnishing blood to a patient and a restaurant's furnishing food to a patron. In most jurisdictions the furnishing of food by a restaurant to a customer is a sale to which an implied warranty of fitness attaches.[16] The same result is reached in Mississippi by raising an implied warranty irrespective of a sale by the restaurant. The approach of the Mississippi court may be justified on the ground that because of the patron's unavoidable reliance on the edible quality of the food served, he should be protected by an implied warranty. Existence of a *technical* sale is not the question.[17] Likewise, in the incompatible blood cases it is said that the court should not require a sale as a condition precedent to an implied warranty of fitness.[18] The reason why a sale has been considered a *sine qua non* to an implied warranty is that implied warranty is thought to sound in contract rather than tort. It has been pointed out that this is incorrect historically: "In its inception the liability (on implied warranty) was based on tort, and the action was on the case . . . ."[19] The purpose for which the doctrine of implied warranty exists today, as well as historically, is not merely to protect a consumer in privity of contract with his producer. Rather, the reason for the doctrine is that the consumer, who must of necessity rely upon the fitness for intended use of consumer products, should be protected in his reliance.[20] There is a pertinent analogy between the consumer-producer and the patient-hospital relationships, given the fact that the hospital tests and prepares the blood for transfusion and furnishes it to the patient for a price. This analysis of the nature of implied warranty and the reason for its existence is supported by a minority of jurisdictions which hold that implied warranty sounds in tort, thereby allowing liability notwithstanding the absence of privity of contract.[21] Moreover, in a large minority of states the courts have extended the implied warranty doctrine in *defective food* cases to persons not in privity of contract, but

[13] *E.g.*, Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954).

[14] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[15] Perlmutter v. Beth David Hospital, 308 N.Y. 100, 108, 123 N.E.2d 792, 796 (1954).

[16] *E.g.*, Cushing v. Rodman, 65 App. D.C. 258, 82 F.2d 864 (D.C. Cir. 1936). *Contra*, Albrecht v. Rubenstein, 135 Conn. 243, 63 A.2d 158 (1948); *cf.* Babcock v. Nudelman, 367 Ill. 626, 12 N.E.2d 635 (1937).

[17] Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946).

[18] *Cf.* Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D. N.Y. 1912).

[19] Prosser, Torts § 83, at 493 (2d ed. 1955).

[20] See, *e.g.*, Sartin v. Blackwell, 200 Miss. 579, 28 So. 2d 222 (1946).

[21] *E.g.*, Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960). *Contra, e.g.*, Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949).

who should nevertheless be covered by the warranty because of necessary reliance on the fitness of the food in question.[22] Some jurisdictions extend the implied warranty by use of a fiction,[23] while others simply hold the food producer strictly liable to the consumer on an implied tort warranty of fitness irrespective of privity of contract.[24]

The conclusion seems apparent that a technical sale should not be required in the incompatible blood cases as a condition precedent to an implied warranty. The doctrine, irrespective of a sale, should be extended to cover blood transfusion cases. However, an exception should be made where the case is of the impure blood category, because of the present limitations of medical science as discussed above. It is submitted that in Mississippi such extension of the doctrine would be consistent with the pertinent Mississippi case law to date. Mississippi recognizes liability of a charitable hospital for negligence of its employees and has held a hospital liable for negligence in an incompatible blood case.[25] Although Mississippi maintains that implied warranty sounds in contract rather than tort,[26] the Mississippi Supreme Court has stated, " 'The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor . . . *A sale is not the only transaction in which a warranty may be implied.*' "[27] (Emphasis added.) In the quoted case, the Mississippi court recognized that a technical sale is not a condition precedent to an implied warranty of a restauranteur covering food served to customers. Note also that in the transfusion cases thus far litigated, all have held no implied warranty because of the lack of a sale. Moreover, in the defective food cases, the Mississippi rule is that the "implied warranty runs with the title . . . ."[28] thereby inuring to the benefit of a donee. Thus the undesirable result of requiring a sale, *i.e.*, strict privity of contract as a condition precedent to an implied warranty is avoided by use of a fiction. The Mississippi court apparently recognizes the real purpose of the implied warranty doctrine, *viz.*, protection of the consumer who cannot protect himself. The Mississippi wrongful death statute is specifically applicable where death is caused by breach of an implied warranty of fitness.[29] Assuming specific negligence could not be proved (as in the noted case), due to probable complications with the theory of *res ipsa loquitur* in Mississippi,[30] implied warranty would likely be the only basis for a hospital's liability.

William Timothy Jones

---

[22]*E.g.*, Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). *Contra*, Hollis v. Armour & Co., 190 S.C. 170, 2 S.E.2d 681 (1939).

[23]*E.g.*, Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[24]*E.g.*, Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); See generally PROSSER, TORTS § 84, at 508 (2d. ed. 1955).

[25]Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), 25 A.L.R.2d 12 (1952).

[26]Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949).

[27]Sartin v. Blackwell, 200 Miss. 579, 583, 28 So. 2d 222, 223 (1946) (quoting 1 WILLISTON, SALES, § 2426 (2d ed. 1924)).

[28]Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 883, 111 So. 305, 307 (1927).

[29]MISS. CODE ANN. § 1453 (1956).

[30]See, *e.g.*, Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949).

Oil and Gas—Scope of the Easement in Granting Surface Rights to the Lessee

Action by surface owner to enjoin oil and gas lessee from using the water flooding method to increase oil production. The lessee filed a supplemental counterclaim for a declaration of rights whereby it sought to use the pipe lines it had constructed on surface owner's property to bring in oil from other lands. The lease agreement granted the right to "use all means and appliances on or off these premises to secure and facilitate the production of oil and gas," and gave the lessee a "right of way over the same for any purposes." The lower court held lessee liable for damages resulting from the use of the water flooding method, and rendered supplemental judgment that the defendants were not entitled to use the surface of the leasehold for production of oil from other lands. Held: Affirmed. The mineral owner must enjoy his easement with due regard to the interests of the surface estate, and any such easement must be construed in connection with the lease of which it is a part. *Wiser Oil Co. v. Conley*, 346 S.W.2d 718 (Ky. 1960).

It is apparent that the principal purpose of the lease is the development of the mineral estate and that the lessee should have all those rights necessary to accomplish such purpose, whether they are specifically enumerated or not.[1] The surface rights are appurtenant to the mineral estate, and the lessee has the right to use so much of the surface of the land as reasonably might be necessary to enjoy the mineral estate so acquired.[2] But the mineral owner or lessee must enjoy his easement with due regard to the interest of the servient estate, *i.e.*, the surface estate.[3] In the absence of a specific provision in the lease, these surface rights are not exclusive, and the surface owner may use the surface in any way not inconsistent with the mineral owner's rights[4] and may alienate his interest.[5] There are many implied easements in a lease, the most usual of which is an easement of ingress and egress.[6] The basic requirement for such an implied easement is that a necessity exists which is actual, real, and apparent.[7] But in cases involving the rights of a mineral owner to use the surface estate the only condition required is that there be a reasonable necessity.[8] The courts have apparently been influenced in this phase of the problem by the social desirability of recovering essential minerals such as oil and gas.[9]

The question often arises as to whether the easement is limited to such use as would be reasonably adequate at the time of the severance. It may be said with some certainty that now it is generally accepted that a mineral owner or lessee may employ modern methods of exploration and development even though at the time of the execution of the lease

---

[1]See, *e.g.*, Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950).

[2]*E.g.*, Magnolia Petroleum Co. v. Howard, 182 Okla. 101, 77 P.2d 18 (1938).

[3]See, *e.g.*, Jenkins v. Depoyster, 299 Ky. 500, 186 S.W.2d 14 (1945).

[4]*E.g.*, United North and South Oil Co. v. Mercer, 286 S.W. 652 (Tex. Civ. App. 1926).

[5]See, *e.g.*, Pleas v. Thomas, 75 Miss. 495, 22 So. 820 (1897).

[6]See, *e.g.*, Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

[7]See Romanchuk v. Platkin, 215 Minn. 156, 9 N.W.2d 421 (1943).

[8]See, *e.g.*, Page v. State *ex. rel.* Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

[9]Comment, 26 Rocky Mt. L. Rev. 277 (1954).

such methods were uncommon or even unknown.[10] To permit the lessee to employ only those methods in vogue at the time of severance would, in effect, render many mineral estates worthless.[11] But where, as in the noted case, there is no express release of damages and the new method employed will destroy or substantially damage surface owner's remaining estate, "principles of justice and humanity would require that reasonable compensation be paid the landowner for the devastation wrought."[12] If the lease specifically provides that the lessee has the privileges necessary to develop the leased premises for oil and gas conjointly with neighboring lands, the lessee may build pipe lines across the leasehold for use in conveying the mineral from adjoining lands,[13] but only if he is also conducting operations upon the leased tract.[14] The theory is that the surface easements so granted are "appurtenant to, and to be used and exercised in connection with the right to explore for and reduce to possession the dominant estate granted."[15] In the absence of a specific provision in the lease, the lessee cannot use the leased land as a basis of operations on other lands[16] because such constitutes an excessive use of his surface easement.[17] Nor does the easement extend to the point where the lessee "may himself or permit others to invade the surface for the purpose of exploring neighboring property."[18] It is interesting to note that the lessee would be liable to his lessor for drainage caused by the operations of the lessee on adjoining premises while he would not be liable if such drainage were caused by the operations of another.[19] At the same time, however, the surface owner may not permit the use of the premises for a well to be bottomed under other premises which will cause drainage.[20]

In the noted case, it seems that the court, in effect, limited the easement to the method of production known at the time of the severance, for the lease expressly provided that "all" the oil and gas had been sold, and such provision necessarily raises an implied easement for the reasonable use of the surface to acquire possession of the mineral no matter what method is used. Also, the court, even in the face of an express easement granting a right of way for any purpose, limited the use of the surface estate to the lease of which it was a part saying

---

[10]See, *e.g.*, Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (1950).

[11]Comment, 26 ROCKY MT. L. REV. 277 (1954).

[12]Wiser Oil Co. v. Conley, 346 S.W.2d 718, 721 (Ky. 1960).

[13]*E.g.*, Kentucky West Virginia Gas Co. v. Crum, 258 Ky. 508, 80 S.W.2d 537 (1935).

[14]*E.g.*, Kentucky Pipe Line Co. v. Hatfield, 223 Ky. 315, 3 S.W.2d 654 (1927).

[15]*Id.* at 655.

[16]See Franz Corp. v. Fifer, 295 Fed. 106 (9th Cir. 1924).

[17]See, *e.g.*, Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957). *But cf.* Richard v. Sohio Petroleum Co., 234 La. 804, 101 So. 2d 676 (1958).

[18]Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957).

[19]See, *e.g.*, Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954).

[20]See Hancock Oil Co. v. Meeker-Garner Oil Co., 118 Cal. App. 2d 379, 257 P.2d 988 (Dist. Ct. App. 1953). *But see*, Atlantic Ref. Co. v. Bright & Schiff, 321 S.W.2d 167 (Tex. Civ. App. 1959).

that a "right of way may be used when such is reasonably required in connection with the operation of the lease."[21] It appears that the only time the courts will extend the scope of the easement to include operations on neighboring lands is when it is expressly spelled out in the lease.

Richard M. Edmonson

Restitution—Necessity of Returning Consideration to Avoid Release

Testator died leaving an estate in excess of $2 million. Neither of his nearest surviving relatives, his brother (appellee) and brother's son, testator's nephew, were provided for in the will. The nephew was one of the beneficiaries of a $100,000 life insurance policy found in testator's lockbox, but a 1944 endorsement had amended the original beneficiary clause to some extent. A controversy concerning the effect of this endorsement led executor bank to compromise nephew's claim, paying him $50,000 by check and obtaining a release from both nephew and his father to any claims either had against the policy or testator's estate. Both brother and nephew acknowledged receipt of the check payable to nephew as a final settlement of any claims of either against the policy or estate. Later, the brother discovered that prior to the execution of the release a codicil had been found (later proved spurious); that testator had backdated the probated will; that testator had "revised" the will by removing seven of the nine pages and substituting therefor seven new ones; and that testator had made prior wills. The record shows that executor bank knew of the above facts at the time of the execution of the release; that the brother and nephew did not then know such facts; that after discovery of the facts by the brother, the bank had made three offers to rescind the release upon return of the $50,000 paid; but that the brother had refused to pay the money or see it paid. The brother claimed that no part of the $50,000 was paid to him; that at the time he executed the release he knew of no claim he might have to settle; that he had been defrauded into signing the release; and that he had received nothing that could be returned and was under no duty to see the $50,000 returned as a condition to avoiding the release. The brother filed suit to contest the will and the trial court held both the will and release void. Held: Reversed. Brother could not avoid the effect of the release and contest the will as he had not restored or offered to restore the $50,000 paid his son, the nephew, and the release precluded him or anyone acting in his stead from maintaining an action to contest the will. *First National Bank of Mayfield v. Gardner*, 348 S.W.2d 843 (Ky. 1961) (4-3 decision).

The weight of authority seems to be that, subject to certain exceptions, one who executes a release and later seeks to avoid it on any ground must first restore, tender, or offer to restore the consideration received for the execution of the release.[1] There is authority to the contrary, and the Arkansas court has concluded that the weight of modern authority is to the contrary.[2] But even in jurisdictions following

---

[21]Wiser Oil Co v. Conley, 346 S.W.2d 718 (Ky. 1960).

[1]*E.g.*, Taylor v. Palmetto State Life Ins. Co., 196 S.C. 195, 12 S.E.2d 708 (1940).

[2]Perkins Oil Co. v. Fitzgerald, 197 Ark. 14, 121 S.W.2d 877 (1938).

the rule first stated, the tender or restoration is not required if the one seeking to rescind shows sufficient reason for failure to do so.[3] The consideration must be of value at the time of the discovery of the ground for avoidance or no return or tender is necessary.[4] A releasor is not required to return that which, in any event, he is entitled to keep, independent of the release itself.[5] He is not required to return the consideration where it appears from statements of the releasee that he would not accept tender and therefore return or tender is futile,[6] or where prior offers to return the consideration show that further tender would be a vain and idle ceremony, it being sufficient to instruct the jury to deduct the consideration paid from the damages assessed.[7] Of course, where no consideration was actually received as alleged, nothing need be restored since there is neither a valid contract of release to rescind nor any consideration which can be tendered back.[8] Where plaintiff denies that he knowingly or understandably signed a release or received any money, return of money paid is unnecessary.[9] Some authorities hold that it is not necessary for releasor to return consideration paid if he is unable to do so,[10] but the cases are in conflict. The rule prevails in Iowa and several other jurisdictions that where a release for a personal injury claim is obtained by fraud, a return or tender is not unnecessary, an offer to credit the sum received upon the total amount ultimately due being sufficient.[12]

Some courts make a distinction between a release obtained by fraud in the factum or procurement and one obtained by fraud in the treaty or inducement,[13] holding that the former renders the release void and no tender or return is necessary, but that the latter merely renders the release voidable and tender or restoration is a condition precedent to avoidance. The Mississippi court made a similar distinction, holding that where the plaintiff, an aged Negro, less than twelve hours after the amputation of his foot, while under sedation, in pain and waking only when aroused, and in the absence of his friends, was induced by fraud to execute a release from his claim in consideration of $300 paid, the release was *void*, and tender back of the money paid was not necessary.[14] But later the court held that a railroad engineer who settled for the loss of a foot for $6,000 paid and an oral promise of rehire could not bring a suit for damages without first returning the consideration paid, as the release was at the most *voidable* because of alleged

[3]*E.g.*, Mutual Sav. Life Ins. Co. v. Hines, 96 Ga. App. 442, 100 S.E.2d 466 (1957).

[4]*E.g.*, Holcomb v. Long Beach Ins. Co., 129 Cal. App. 285, 19 P.2d 31 (1933).

[5]*E.g.*, M. G. Chamberlain & Co. v. Simpson, 173 Cal. App. 2d 263, 343 P.2d 438 (1959).

[6]*E.g.*, Medlin v. Vanderbilt, 133 S.C. 256, 130 S.E. 893 (1925).

[7]Butler v. Gleason, 214 Mass. 248, 101 N.E. 371 (1913).

[8]*E.g.*, Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313 (1906).

[9]*E.g.*, Roy v. Kirn, 208 Mich. 571, 175 N.W. 475 (1919).

[10]*E.g.*, Ipock v. Atlantic & N. C. R.R., 158 N.C. 445, 74 S.E. 352 (1912).

[11]*E.g*, Meisel v. Mueller, 261 S.W.2d 526 (Mo. Ct. App. 1953).

[12]*E.g.*, Scheel v. Superior Mfg. Co., 249 Ia. 873, 89 N.W.2d 377 (1958).

[13]See generally, Picklesimer v. Baltimore & Ohio R.R., 151 Ohio St. 1, 84 N.E.2d 214 (1949).

[14]Jones v. Alabama & Vicksburg Ry., 72 Miss. 22, 16 So. 379 (1894).

fraud and not void.[15] The release was obtained a year after the injuries complained of, and the court reasoned that the releasor had full opportunity to reflect on the extent of his injuries and to decide whether or not to accept the settlement.

Since Kentucky follows the majority view as to the prerequisite of returning the consideration,[16] it is clear that any consideration received by the releasor must be returned. But, as contended by the appellee, what did he receive? It was admitted by appellant bank that the check was payable to the other releasor, the nephew. A general exception to the first stated rule is that if the entire consideration passes to a third party, there is no requirement of tender or return by the releasor, as he has nothing in his hands to return.[17] In the instant case, the Kentucky court relies on one of its own decisions which held that where an insurance company paid $500 to releasor and $500 to his doctor, releasor must pay or tender the entire $1,000.[18] The reasoning was that since releasor directly or indirectly received the benefit of the total sum paid, he could not have the settlement set aside otherwise. It seems that the cases can be distinguished. In the above case, the money paid to the third party was paid *indirectly* to the releasor, but in the instant case no part of the money paid was for the use or benefit of the appellee who sought avoidance. A Michigan case is more analagous to the instant case.[19] There it was held that if plaintiff executed a release to defendant to induce him to buy a house from plaintiff's wife, there was sufficient consideration to support the release; but if such release was obtained by defendant's fraud, it was not necessary for plaintiff to return the consideration paid his wife in order to avoid the release for such fraud. The consideration passing to the appellee in the instant case was the payment of the $50,000 insurance money to his son, the nephew—a similar third party beneficiary situation. Suppose the estate had been $2,000 instead of $2 million. Would the court have held that restoration or tender of the $50,000 insurance proceeds was a prerequisite to making a claim against a $2,000 estate?

J. H. Hogue, Jr.

TORTS—DUNNING: AN INVASION OF THE RIGHT OF PRIVACY?

Action for damages against Moskin Stores, Inc., and others for the invasion of plaintiff's right of privacy. Plaintiff alleged that the defendants were operating a commercial business and in an attempt to collect money allegedly owed by the plaintiff to the defendants, an employee of defendants telephoned plaintiff's wife and sister-in-law, representing that she had dated the plaintiff and that she was "in trouble." She also led the persons to whom she talked into believing that plaintiff had engaged in adulterous activities. The trial court sustained the defendant's demurrer and granted a non-suit. HELD: Reversed and remanded. Invasion of the right of privacy is an actionable wrong. Mere efforts of a creditor to collect a debt without more cannot be con-

---

[15]Smith v. St. Louis & S. F. R.R., 112 Miss. 878, 73 So. 801 (1917).

[16]Adm'x v. Louisville & U. R.R., 267 Ky. 435, 102 S.W.2d 343 (1937).

[17]*E.g.*, Averill v. Wood, 78 Mich. 342, 44 N.W. 381 (1889).

[18]Poteete v. Moore, 277 Ky. 233, 126 S.W.2d 161 (1939).

[19]Averill v. Wood, 78 Mich. 342, 44 N.W. 381 (1889).

sidered a wrongful and actionable intrusion, but the right to pursue the debtor is not a license to outrage the debtor. The debtor has a cause of action for injurious conduct on the part of the creditor which exceeds the bounds of reasonableness. *Norris v. Moskin Stores, Inc.*, 132 So. 2d 321 (Ala. 1961).

The right of privacy was not one which was recognized as actionable at common law,[1] and was not so recognized until 1905[2] when the Georgia Supreme Court followed the theory of a famous article by Warren and Brandeis.[3] The right of privacy has been defined as the right to be left alone, and the gist of the action is the mental anguish and pain suffered by the one intruded upon.[4] It has been said that recovery should be allowed only where the conduct of the creditor would injure or offend a man of normal sensibilities. Neither the intent of the creditor, nor the truth of the matter is a defense to the action.[5] Originally, as suggested by the Warren and Brandeis article,[6] the right to the action was limited to written words,[7] but such is no longer the case.[8] At least some form of the right of privacy is now followed in the majority of states,[9] and it is only expressly rejected by four: Rhode Island,[10] Nebraska,[11] Texas,[12] and Wisconsin.[13] It is generally recognized that there are four separate actions which may be carved out of the right of privacy:[14] (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Unreasonable harassment of a debtor by the creditor falls into the first of these categories.[15] In those states which recognize this action, the crux of the problem is interpreting the word "unreasonable."[16] For instance, informing the debtor's wife that if the debt is not paid the debtor's job will be in jeopardy and then attempting to have the debtor's employer apply pressure has been held reasonable conduct on

---

[1]See PROSSER, TORTS § 97, at 635 (2d ed. 1955); see also 27 MISS. L.J. 256 (1956).

[2]Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[3]Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[4]Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[5]David v. General Fin. & Thrift Corp., 80 Ga. App. 708, 710, 57 S.E.2d 225, 227 (1950).

[6]Warren & Brandeis, *supra* note 3.

[7]See, *e.g.*, Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1945).

[8]See, *e.g.*, Housh v. Peth, 99 Ohio App. 485, 135 N.E.2d 440 (1955), *aff'd*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[9]Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960).

[10]Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909).

[11]Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).

[12]Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952).

[13]Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

[14]PROSSER, TORTS § 97, at 637-39 (2d ed. 1955).

[15]See, *e.g.*, Norris v. Moskin Stores, Inc., 132 So. 2d 321 (Ala. 1961); see generally Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[16]See Annot., 14 A.L.R.2d 750 (1949).

the part of the creditor.[17] However, the right of privacy was violated when the creditor initiated a campaign to harass the debtor by telephoning him six or eight times every day for three weeks at his home and place of employment and also informed the debtor's employer of the debt.[18]

Mississippi has never expressly found that the intrusion of the right of privacy is an actionable wrong per se, but it has been so implied.[19] The Mississippi Supreme Court has indicated that it would recognize the right of privacy at least in so far as publishing one's picture in a newspaper is concerned, but that such action was not reserved to a public official in which the public has a general and legitimate interest.[20] In an earlier case, where an agent of an insurance company used insulting and abusive language to the plaintiff in his home, the Mississippi court upheld the judgment against the insurance company on the ground of the family's right to the "quiet and peaceable enjoyment of the home, free from hostile intrusions."[21] The above case cited as authority another Mississippi case where an agent of a sewing machine company entered the home of a married woman and made oral advances to her while attempting to sell a sewing machine.[22] Recovery against the sewing machine company was allowed, although the court did not discuss the basis of the tort. In Mississippi the element of intent in an action for malicious infliction of mental suffering may be implied from the conduct of the creditor.[23] This gives Mississippi another ground besides invasion of the right of privacy for allowing a debtor recovery against an harassing creditor. In some states recovery has also been allowed against a creditor for libel,[24] but the problem has never arisen in Mississippi. It is submitted that in view of the past decisions of the Supreme Court of Mississippi, should a case similar to the noted case come before the court, recovery would be allowed on a theory of invasion of the right of privacy. That this would be a just result can hardly be questioned, because absent implied malice or libelous matter, there might be no other ground of recovery for the unreasonably harassed debtor.

Arnold F. Gwin

---

[17]Tollefson v. Safeway Stores, 142 Colo. 442, 351 P.2d 274 (1960); see Patton v. Jacobs, 78 N.E.2d 789 (Ind. 1948) (letter from creditor soliciting employer's aid); David v. General Fin. & Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 225 (1950) (telegram from creditor threatening legal action).

[18]Housh v. Peth, 99 Ohio App. 485, 135 N.E.2d 440 (1955), *aff'd*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[19]See Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951); see also 27 Miss. L.J. 256 (1956).

[20]Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951).

[21]Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935).

[22]Singer Sewing Mach. Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934).

[23]Arnold v. Spears, 217 Miss. 209, 63 So. 2d 850 (1953); compare La Salle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

[24]*E.g.*, Schieve v. Cincinnati & Suburban Bell Tel. Co., 71 Ohio L. Abs. 350, 126 N.E.2d 817 (Ct. App. 1955).

RECENT BOOKS

EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES
"Squeeze-Outs in Small Enterprises"

Prepared by Duke University under the Small Business Administration Management Research Grant Program; F. Hodge O'Neal, Project Director; Jordan Derwin, Research Associate: Duke University Press, 1961. Pp. 247. $10.00.

This book is a documentary report of a series of investigations made of the problems of small business enterprises. It is one of a series of studies made under the Management and Research Grant Program of the Small Business Administration at Duke University.

The information was obtained from field work and library research, which is unusual if not unique in legal research. Small businessmen, lawyers, and business advisers throughout the country were contacted for specific instances in which majority owners of small business corporations and partnerships eliminated or tried to eliminate university owners as associates in business.

This book gives the results found of the methods used in squeeze-outs. It also suggests preventive measures for forestalling such squeeze-outs in small businesses and takes a look at some suggested additional protective legislation to protect unsuspecting investors in small business from the selfish, the greedy and the unscrupulous majority shareholders of small enterprises. The book is essentially "a distillation of the experience and thinking of some of the nation's most resourceful lawyers, businessmen and business advisers."

The study, as thus reported, can and will serve as an index to aid those entering any business and the lawyer or business adviser whose professional services are engaged to give technical advice at the inception of the organization. The experiences given will help those who should foresee problems that may be generated when tension or conflict arises. The suggestions made will indicate proper legal protection against and prevention of any unfair, unconscionable, or even illegal moves that may arise in the internal management of any business, especially regarding the family, the close, or small privately owned corporation or partnership business.

The term "squeeze-out" means the use of strategic position, inside information powers of control, or the utilization of some legal device or technique, by some of the joint owners or participants in any business enterprise to eliminate from the enterprise one or more of the other owners, shareholders, or partners. The book gives various squeeze-out techniques that have been used and suggests remedies available. It lists and discusses typical underlying causes of squeeze-plays. It outlines arrangements that, under existing law on corporations and partnerships, may be set up in advance by the careful lawyer to prevent and protect from one group of owners taking advantage of and squeezing out another group or an individual co-owner. At the conclusion it suggests the changes in existing law to give greater protection from the expulsion or oppression of business associates.

The appendix contains in detail the facts of four specific cases wherein some of the owners in an enterprise tried to reduce or to eliminate completely participation of some of their associates in the business. From these four illustrative cases, one may discover the more frequently used squeeze-out techniques and how they unfold.

Mississippi lawyers will find this brief but informative study most helpful as a basis for counselling in the organization of corporations and partnerships to prevent squeeze-outs in small businesses (and most business enterprises in Mississippi are in the classification of small businesses). Preventive law, like preventive medicine, renders a better service to those seeking our counsel.

Forrest B. Jackson
Attorney at Law
Jackson, Mississippi

THE MENTALLY DISABLED AND THE LAW

A report of the American Bar Foundation on the Rights of the Mentally Ill, edited by Frank T. Lindman and Donald M. McIntyre, Jr.: The University of Chicago Press, 1961. Pp. 444.

This report is published after five years of exhaustive research in the broad field indicated by the title. It is an accomplishment entirely in accord with one of the purposes of the American Bar Foundation set forth in its Articles of Incorporation: "to study, improve and to facilitate the administration of justice." The law of the several states is surveyed as it relates to the rights of the mentally disabled. Broad coverage is given to Hospitalization, Voluntary and Involuntary; Rights of Hospitalized Patients; Separations from Mental Hospitals. The study covers other areas of the social problem of mental illness in chapters on Eugenic Sterilization, Domestic Relations, Incompetency and Restoration, Personal and Property Rights. Problems of mentally disabled and the criminal law are treated in two sections: The Sexual Psychopath; Mental Disability and the Criminal Law. Numerous tables, voluminous notes, appendices, and indices contain innumerable references to data and authorities, which provide an invaluable source of material for research.

Though many contributors are responsible for a study such as this, much credit must go to Frank T. Lindman, Research Attorney at the American Bar Foundation, and Donald M. McIntyre, Jr., Assistant Administrator at the American Bar Foundation, for their skill in editing the mass of material accumulated. Not only is the material well organized as to the existing position of the law in a certain situation, but problems are spotlighted with thought provoking comments.

The history of the confusion surrounding mental disability is the launching pad of the study. The attitude of the law and society of being desirous of excusing the mentally ill from criminal responsibility and of protecting society and the mentally defective is frustrated by the inability to properly define such simple terms as "mental illness," "mental defect," "insane," and the like. Historical trends call to the reader's attention that much has been learned in the field of mental disability during the last few years. Fresh insight into the many medico-legal problems can only be gained by a serious re-evaluation of the many factors involved. For example, early concepts of mere detention have evolved into workable ideas of treatment and final discharge. The person suffering from mental illness is too frequently categorized with the mentally defective.

In each of the broad sections of the study, the editors weave the

mass of material into a tapestry where the reader can, with the use of the tables at the end of each section, view the whole fabric of the law of the several states at one time. This is further embroidered by the appendage of conclusions and recommendations.

The study reveals, in the opinion of this reviewer, the spasmodic growth of this field in the law. Serious deficiencies are revealed and recommendations are made which will be of considerable benefit if acted upon by legislative study committees. Consideration must be given to thorough reforms instead of minor changes. Definitions must accurately describe and define mental deficiencies; advances in medical research must be written into legal definitions; criminal responsibility must be redetermined in the light of new psychological knowledge.

Some changes are obviously necessary in determining mental deficiencies as they affect civil rights. Other areas, such as those of criminal responsibility, indicate that serious studies are needed to provide workable rules which will better protect society while giving adequate safeguards to individual rights.

This study should be of great interest to the legal and medical professions in fostering better understanding of mutual problems. It is an important milestone in a field of the law which is full of confusion and ripe for reformation.

Arthur B. Clark, Jr.
Circuit Judge, Fourth District
Indianola, Mississippi

BOOKS RECEIVED

ESSAYS ON PROCEDURE AND EVIDENCE. Edited by Thomas G. Roady, Jr. and Robert N. Covington. Nashville, Tenn.: Vanderbilt University Press, 1961. Pp. 288. $7.50.

HEART DISEASE AND THE LAW. Harold F. McNiece, Study Director. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1961. Pp. 631. $25.00.

SURGERY COURT CASES. Howard Newcomb Morse. New York: The Reuben H. Donnelley Corporation, 1961. Pp. 55.

THE SUPREME COURT REVIEW, 1961. Edited by Phillip B. Kurland. Chicago: The University of Chicago Press, 1961. Pp. 332. $6.50.

If You Were Planning A Citation Service Just For Yourself—

You Would Want To Know:

1—Where a case in point has been reported in other sets of reports—with an eye towards the key number in the National Reporter System and the notes in the Annotated Reports System.

2—Whether the case has ever been affirmed, reversed, or dismissed on appeal.

3—How the state and federal courts have interpreted the case in later decisions—whether it has been overruled, questioned, criticised, etc.

4—What other cases in point are available by direct citation in the reports, notes of the Annotated Reports System, or law review articles.

5—Whether a statute upon which you were relying has been amended, repealed, or superseded by a subsequent enactment.

6—What construction has been placed upon this statute by your state and federal courts.

7—That the service is accurate, national in scope, compact in style, economical in upkeep, and easy to use.

8—That the service is supported by an old well-established organization as an endorsement of its stability.

Shepard's Citations measures up to all of these specifications and more. **Mail a test request to our Service Bureau and see for yourself what Shepard's Citations will do for you.**

SHEPARD'S CITATIONS

COLORADO SPRINGS, COLORADO

EVERY MISSISSIPPI LAWYER'S LIBRARY SHOULD CONTAIN THE FOLLOWING . . .

MISSISSIPPI CODE 1942 Annotated, Recompiled Ed.,
15 Volumes, including Current Pocket Parts $144.00
1960 Pocket Parts separately 27.50

BUNKLEY and MORSE'S AMIS DIVORCE and SEPARATION in Mississippi with Forms, 1 Volume 20.00

DUNN, MISSISSIPPI WORKMEN'S COMPENSATION LAW and PRACTICE with Current Pocket Part Supp... 20.00
1960 Cumulative Pocket Supplement (separately) 8.00

GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, Revised Edition, 1950 ..... 20.00

GRIFFITH, OUTLINES OF THE LAW Mississippi Edition, 1949 ..... 10.00

McELROY, MISSISSIPPI EVIDENCE, 1955 ..... 20.00

MORSE, MISSISSIPPI LEGAL FORMS ANNOTATED, 2 Vols., including Current Pocket Parts 45.00
1961 Pocket Parts separately 15.00

WINGO, MISSISSIPPI CRIMINAL LAW and PROCEDURE, 1951 ..... 20.00

Descriptive folders mailed upon request.

(LIBERAL TERMS EXTENDED)

THE HARRISON COMPANY

LAW BOOK PUBLISHERS

93 Hunter Street S. W., P. O. Box 4214 Atlanta 2, Georgia

MISSISSIPPI REPRESENTATIVE

Morton Hawkins

531 Wright Mill Road Auburn, Alabama

WORTH CONSIDERING

OPPORTUNITY and the PRUDENT LAWYER

With the volume of Federal litigation showing new signs of accelerated growth, the prudent lawyer considers these days of opportunity. Opportunity to better serve his clients, and in so doing to better serve himself. The prudent lawyer knows he cannot ignore "the other half of the law".

The lawyer's reputation affects his practice

In no other profession is personal reputation as important as it is in the practice of law. The lawyer who has equipped himself to completely protect his clients has an enviable reputation. Moreover, Federal cases extend the range of a lawyer's thought. The lawyer who uses Federal publications has an enviable reputation in any community, large or small, everywhere in America.

The TREND towards increasing Federal problems is by now unmistakably established.

The OPPORTUNITY for increased benefits to both client and lawyer is at hand.

We want to send you information about the books that can help you best do your part in this growing phenomena. The boom in Federal litigation is sure to affect your practice one way or another, so write for details now.

WEST PUBLISHING CO.
St. Paul 2, Minn.